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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1906.

No. 601.

SOUTHERN RAILWAY COMPANY et al., Appellants,

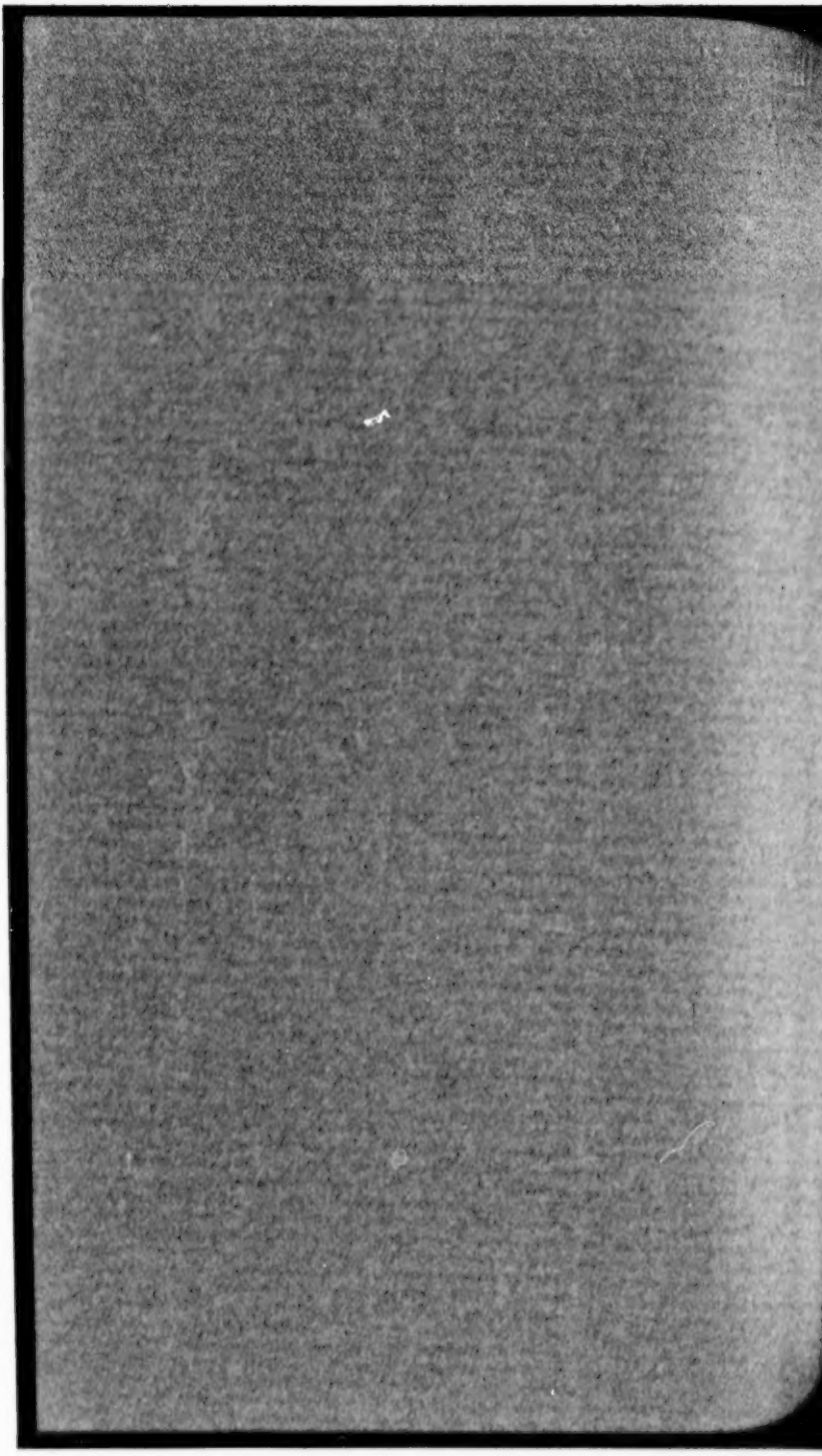
vs.

H. H. TIFT et al., Appellees.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

*Argument of* ED. BAXTER,
*Of Counsel for Appellants.*

Foster, Webb & Parker, Nashville, Tenn.



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vs.

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Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

*Argument of ED. BAXTER,*
*Of Counsel for Appellants.*

## PART I.

## STATEMENT OF THE CASE.

### I.

### THE DECREE APPEALED FROM.

This is an appeal from a decree rendered December 15, 1906, by the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decree in Equity rendered July 8th, 1905, by the Circuit Court of the United States for the Southern District of Georgia.

Trans., Part III, p. 1258.

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Said decree of the Circuit Court ordered and adjudged that a certain advance in rates upon lumber complained of in the bill, filed by appellees, amounting to 2 cents per one hundred pounds, and made effective by appellants, on June 22, 1903, from lumber shipping points within the State of Georgia, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly designated as Ohio River points or crossings, was and is excessive, unreasonable and unjust, and in violation of the provisions of the act of Congress, known as the Act to Regulate Commerce, and the amendments thereto; and that the rates and charges resulting from said advance are likewise excessive, unreasonable and unjust, and in violation of the Act to Regulate Commerce.

Said decree enjoined the appellants, jointly and severally, to discontinue and wholly cease and desist from maintaining, or enforcing the said advance in rates upon shipments of lumber from points in Georgia to Ohio River destinations and points basing thereon.

Said decree directed that an order of reference to the Standing Master be taken, with instructions to said Master to ascertain the sum total of the increase in rates paid by each of the appellees and other members of the Georgia Saw Mill Association, to either or all of appellants, since the advanced rate went into effect, and to the end of the litigation; and to report such amount to the Court in order that decree of restitution may be made.

And that the costs of the suit be awarded against the appellants.

Trans., Part III, pp. 1227, 1228, 1229.

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## II.

### Original Proceedings in the Circuit Court—Original Bill.

On April 17, 1903, appellees filed in the Fifth Circuit Court of the United States for the Southern District of Georgia, a bill for injunction and relief, on behalf of themselves and all other members of the Georgia Saw Mill Association, to which bill appellants were made parties defendant.

In said bill it was, among other things, alleged:

First: That the appellees are citizens of the Southern District of Georgia; that three of appellants are citizens of Georgia; that two of them are citizens of Virginia; that three of them are respectively citizens of South Carolina, Kentucky and Louisiana; and that all of them are common carriers engaged in the interstate transportation of lumber from points within to points without the State of Georgia.

Trans., Part I, pp. 17, 18.

Second: That said appellants are members of the Southeastern Freight Association, and that said association was organized and is maintained for purposes which constitute an illegal combination in restraint of interstate trade, and for the fostering of monopoly in destruction of fair competition among carriers engaged in interstate trade.

Trans., Part I, p. 18.

Third: That by unlawful concert of action each of the appellants had given notice that on April 15, 1903, the rates upon yellow pine lumber from points in Georgia to Chatta-

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nooga, Tenn., and to points on the Ohio River and beyond would be advanced 2 cents per hundred pounds.

Trans., Part I, p. 18, 19.

Fourth: That the rights and interests of appellees and of others engaged in the lumber trade would be vitally and injuriously affected by the proposed increase of rates.

Trans., Part I, p. 19.

Fifth: That such increase was unjust, unreasonable and arbitrary; and would impose upon the yellow pine industry a burden out of line with and far more grievous than that sustained by the products of other industries of like weight and value.

Trans., Part I, p. 19.

Sixth: That under the previously existing rates lumber was a very profitable commodity to the carrier, as compared with other like products, value, weight and cost of handling considered.

Trans., Part I, p. 20.

Seventh: That the average freight on yellow pine lumber from the mills to the point of destination amounts in the aggregate to a sum fully equaling the value of the product at the point of shipment.

Trans., Part I, p. 20.

Eighth: That the previously existing rate on lumber was greater per ton per mile than on coal, pig iron and other like products, value, weight and cost of handling considered.

Trans., Part I, p. 20.

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Ninth: That the quality of lumber shipped to the territory involved was of low grade.

Trans., Part I, p. 20.

Tenth: That flat cars, upon which yellow pine lumber is shipped, are required by the carrier to be equipped with standards, strips and supports, at the expense of the shipper, said expense ranging from $2.50 to $3 per car; that upon their weight the shipper is required to pay freight; and that no other commodity is subjected to such unfair and unjust rates and burdens.

Trans., Part I, pp. 20, 21.

Eleventh: That by reason of the competition in territory on and north of the Ohio River with hemlock, spruce and white pine from Canada and the Northern States, and with the woods of the Pacific coast, only the lower grades of Southern yellow pine, for which the market elsewhere is restricted, can be sold in said territory; and that if the rates were advanced as proposed, the capital invested by the Southern yellow pine producers to meet the demand created in said territory would be lost.

Trans., Part I, p. 21.

Twelfth: That to points within the territory north of the Ohio River, rates upon yellow pine are greater than upon other woods.

Trans., Part I, p. 21.

Thirteenth: That yellow pine has been singled out as the sole subject of increase, no increase being proposed on other woods.

Trans., Part I, p. 21.

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Fourteenth: That by reason of increase in cost of raw material, labor and feed for stock, and also by reason of failure of the railways to furnish cars for the transportation of lumber, the cost of production of yellow pine lumber has materially increased, while the market value has remained practically the same.

Trans., Part I, p. 22.

Fifteenth: That by reason of increased capacity of cars and improved appliances, the expenses of railway operations have decreased, and the net revenues of the railways have rapidly and steadily increased.

Trans., Part I, p. 22.

Sixteenth: That if existing conditions require the raising of additional revenue, the carrier should not single out yellow pine lumber to bear the whole burden, but should distribute the increase in rates with equality and fairness upon the various products transported.

Trans., Part I, p. 23.

Seventeenth: That the adjustment whereby the rates upon yellow pine lumber from certain points in Georgia are 1 cent per hundred pounds higher than the rates upon yellow pine lumber from Mississippi to Ohio River points and points beyond is purely arbitrary and without reason or justification.

Trans., Part I, p. 22.

Eighteenth: That the proposed increase in rates is arbitrary and discriminatory, in that it will be made to apply to yellow pine lumber only, and will not include other woods or articles.

Trans., Part I, p. 22.

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Nineteenth: That within the past four years the rate on lumber between the points designated has already been increased 2 cents per hundred, and in some cases 3 cents per hundred.

Trans., Part I, p. 23.

Twentieth: That the existing rate on yellow pine lumber is greater and produces more revenue to the carriers than any other like product, weight, value, tonnage and cost of transportation considered.

Trans., Part I, p. 23.

Twenty-first: That by reason of unfulfilled contracts, entered into before notice of proposed increase in rates, there was special cause why a temporary restraining order should be issued.

Trans., Part I, p. 23.

Twenty-second. That the Southeastern Freight Association is an illegal organization, under the Sherman Anti-Trust Law.

Trans., Part I, pp. 23, 24.

The prayer of said bill was, in brief, that a temporary restraining order be granted, restraining appellants, and each of them, from putting into effect said proposed increase of rates, or any increase of rates on yellow pine lumber, from points within to points without the State of Georgia, until the further order of the Court; also that a rule to show cause be issued; that the injunction be made permanent upon the hearing under the rule; and that the Southeastern Freight Association be declared to be an illegal combination.

Trans., Part I, pp. 24, 25, 26.

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Upon the foregoing bill, an order was issued by the Court on April 14, 1903, granting a restraining order, and a rule to show cause why a temporary injunction should not be issued, as prayed in the bill.

Trans., Part I, pp. 28, 29.

## III.

### Original Proceedings in the Circuit Court,— Amended Bill.

On May 8, 1903, appellees filed an amendment to their original bill, making certain corrections and additions, and, among others, an averment that the acts complained of in the original bill are in violation of the Interstate Commerce Act; that they will occasion irreparable injury to appellants; and occasion a multiplicity of suits.

Trans., Part I, pp. 29, 30, 31.

## IV.

### Original Proceedings in the Circuit Court,— Demurrer.

On May 12, 1903, appellants filed a demurrer to the original bill, based upon the following grounds:

1. Because the said plaintiffs have not in said bill stated any such cause as doth or ought to entitle them to any such relief as is therein prayed.

2. Because it appears by the allegations of said bill that the same does not present a controversy between citi-

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zens of different States, but presents a controversy between citizens of Georgia, as plaintiffs, and citizens of Georgia and citizens of other States as joint defendants, and said bill of complaint does not set up any controversy between said plaintiffs and said defendants arising under the Constitution or laws of the United States.

3. Because the facts stated in said bill show no case of which the United States Circuit Court for the Southern District of Georgia has jurisdiction in equity.

4. Because it appears from the allegations in said bill that the said plaintiffs have not made or stated such cause as entitles them to the relief sought and prayed for, against these defendants in a court of equity of the United States.

5. Because it does not appear from the allegations in said bill of complaint that the same is brought or filed under any statute of the United States, and the same does not set forth facts showing that the complainants, or either of them, are entitled to maintain any bill of complaint against these defendants, or either of them, under any statute of the United States.

6. Because it appears from the said complainants' bill that the said complainants have each an adequate and complete remedy at law, for the said several alleged wrongs, in said bill of complaint set up against these defendants.

7. Because it appears by the allegations of the said bill that the same is brought to restrain an alleged contract, combination or conspiracy in restraint of trade or commerce among the several States, and to monopolize a part of the trade or commerce among said several States, in contra-

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vention of the statutes of the United States, and that under said statutes of the United States neither said plaintiffs nor any individual have any right to any relief in equity, but are restricted to the remedy at law provided by said statute.

8. Because the allegations of said bill do not show that said plaintiffs, or either of them, are entitled to maintain an action under the statute of the United States entitled "An Act to Regulate Commerce," and acts amendatory thereof.

9. Because the granting of the injunction sought in this case would, in effect, fix the rate to be charged by the defendants in the future for the transportation of lumber from Georgia points to points on the Ohio River, and beyond, at the rates now prevailing as the maximum rates; that the right to fix such rates is a legislative power, and not a judicial one; and a decree so fixing said rates is beyond the power and jurisdiction of the Court.

Trans., Part I, pp. 31, 32, 33.

## V.

### Original Proceedings in the Circuit Court—Response to Rule to Show Cause.

On the 12th day of May, 1903, the appellant railway companies, not waiving their demurrer, but relying upon the same, filed a joint and several response to the rule to show cause, issued April 14, 1903, the substance of which response was as follows:

First: It was denied that the Southeastern Freight As-

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sociation was an illegal combination in restraint of interstate trade or that it was formed for the fostering of a monopoly in destruction of fair competition in violation of the Sherman Anti-Trust Law.

Trans., Part I, pp. 111, 112.

Second: It was averred that, as the question of the legality of said Southeastern Freight Association was not raised upon a bill filed by the District Attorney of the United States under the direction of the Attorney General, as prescribed by the Anti-Trust Law, and inasmuch as some of the members of said association were not made parties to the proceeding, the Court was without jurisdiction to decree said organization illegal, or to order its dissolution.

Trans., Part I, p. 112.

Third. It was admitted that each of appellants did severally give notice that on April 15, 1903, a revised tariff of freight rates on lumber from points of shipment in Georgia to Chattanooga, Tenn., and to points on the Ohio River and beyond would be put into effect, whereby the existing rate of each of appellants on yellow pine lumber would be increased 2 cents per hundred pounds; and that such increase would have been put into effect, had it not been for the restraining order granted in this cause.

Trans., Part I, p. 113.

Fourth: It was denied that in promulgating said advance in rates, appellants acted in concert with each other, in pursuance of an unlawful agreement, in restraint of competition or of interstate trade.

Trans., Part I, p. 113.

Fifth: It was averred that said advance in rates was

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made respectively and severally by appellants, free from the dictation or control of any member of said Southeastern Freight Association.

Trans., Part I, p. 114.

Sixth: It was denied that the rights and interests of appellees or others engaged in the lumber trade would be vitally or injuriously affected by the proposed increase of rates.

Trans., Part I, p. 114.

Seventh: It was denied that such increase was unjust, unreasonable or arbitrary; or that it would prove destructive or detrimental to the business of appellees; or that it would defeat or restrict competition in the terriory on and north of the Ohio River; or that it would impose upon the yellow pine industry a burden out of line with or more grievous than that sustained by the products of other industries of like weight and value.

Trans., Part I, p. 114.

Eighth: While it was admitted that the then existing rates on yellow pine lumber yielded some profit to the carrier, it was denied that lumber is a very profitable commodity to the carrier, and it was averred that the existing rates were low, value and tonnage furnished considered, as compared with the rates on other commodities.

Trans., Part I, p. 115.

Ninth: It was denied that the average freight on yellow pine lumber from the mills to the point of destination amounted to a sum equaling the value of the product at the point of shipment.

Trans., Part I, pp. 115, 116.

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Tenth: It was denied that the then existing rates on lumber were greater per ton per mile than the rates on coal, pig iron and other like products, value, weight and cost of handling considered.

Trans., Part I, p. 116.

Eleventh: It was averred that the comparison made in the bill between the rates on lumber and those on coal and pig iron was unfair, irrelevant and misleading.

Trans., Part I, p. 116.

Twelfth: It was denied that the lumber shipped from Georgia to the territory involved is of low grade. It was averred that the greater amount of the lumber so shipped is of medium classification, and that only a small portion of it is low grade.

Trans., Part I, p. 117.

Thirteenth: It was admitted that such flat cars as are used in the transportation of yellow pine lumber are required by the carrier to be equipped with standards, strips and supports; but it was averred that similar requirements are made of others who ship articles which require similar precaution; and it was also averred that the cost of equipping a single car loaded with lumber would not exceed $1.50, including labor and cost of material.

Trans., Part I, pp. 117, 118.

Fourteenth. It was admitted that upon said standards, strips and supports the shipper is required to pay freight; and it was averred that upon practically all classes of traffic which require protection by crating, freight charges are assessed upon basis of gross weight.

Trans., Part I, p. 119.

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Fifteenth: It was admitted that there has been created a market in the territory on and north of the Ohio River for Southern yellow pine lumber; and it was averred that the result has been accomplished by the action of the carriers in reducing their rates to said territory; that Georgia pine has largely superseded other woods for use in said territory, and is without serious competition for many important purposes, such as car construction, bridge and other structural work.

Trans., Part I, pp. 119, 120.

Sixteenth: It was averred that by reason of the phenomenal development of the lumber business, Georgia lumbermen have been enabled to sell in territory on and north of the Ohio River certain very low grades of lumber which were heretofore burned by the mills as waste, and that it is only upon this class of lumber, which constitutes an entirely new or additional business, that appellees have any difficulty in competing with lumber from other sections.

Trans., Part I, p. 121.

Seventeenth: It was averred that if the railways were not permitted to increase their rates from Georgia to the territory involved they would be deprived of sharing to any extent whatever in the phenomenal prosperity of the business in the regular grades of lumber.

Trans., Part I, p. 121.

Eighteenth: It was in substance averred that Alabama and Mississippi, on account of remoteness from the Atlantic coast, have not the same outlet to the East by water transportation for their higher grades of lumber that Georgia has, and said higher grades produced in Alabama and Mississippi are sold in territory on and north of the

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Ohio River. By reason of the relation of rates from Alabama and Mississippi on the one hand, and Georgia on the other, to territory on and north of the Ohio River, the maintenance of the existing low rates from Georgia merely on account of the lower grades of lumber produced in Georgia and sold in territory on and north of the Ohio River, would compel the maintenance of similarly low rates from Alabama and Mississippi, which low rates from Alabama and Mississippi would be chiefly applied on the higher grades of lumber.

Trans., Part I, pp. 121, 122.

Nineteenth: It was admitted that the market for low grades of lumber elsewhere than in the territory on and north of the Ohio River is somewhat restricted.

Trans., Part I, p. 122.

Twentieth: It was denied that to points within the territory on and north of the Ohio River, the rates on yellow pine are now greater than on other woods for equal distances.

Trans., Part I, p. 122.

Twenty-first: It was averred that the rates on yellow pine lumber from points in Georgia to points north of the Ohio River, while quoted as through rates, are in fact combination rates, which are made by adding the rates of Southern lines from points in Georgia to the Ohio River, to the rates charged by the Northern lines from the Ohio River to points of destination north of that river; that the Southern lines have no voice whatever in fixing the rates which the Northern lines charge from the Ohio River northward; and that the rates per ton per mile received by the Southern

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lines are very much less than the rates per ton per mile received by the Northern lines, notwithstanding the fact that the density of population and the density of traffic are very much greater in the territory north of the Ohio River than in the territory south of that river

Trans., Part I, p. 123.

Twenty-second: It was denied that appellants singled out yellow pine as the sole object of the proposed increase in lumber rates; but, on the contrary, it was averred that the proposed increase was to apply on all lumber shipped from points in Southern Georgia to the Ohio River.

Trans., Part I, p. 124.

Twenty-third: It was averred that the rates from Georgia to points on and north of the Ohio River had been made with reference to the rates from Arkansas to the same territory; that the rates from Arkansas had been made in competition with the white pine from Michigan, Wisconsin, etc.; that the Arkansas lines had ascertained that by reason of the diminishing supply of white pine in Northern States, as well as by reason of the existing rates on fir from the Pacific coast, and the higher general range of prices of lumber, they could safely advance their rates to the territory on and north of the Ohio River, the lines from Georgia being relieved to that extent from the Arkansas competition were enabled to justly and fairly increase their rates to the same amount on lumber, to the same territory.

Trans., Part I, pp. 124, 125.

Twenty-fourth: It was denied that the increased rates from Georgia would have the effect to destroy or even injure the market for Georgia yellow pine; or that the capital in-

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vested for the production of lumber to meet the demand created would be lost or in any wise impaired.

Trans., Part I, p. 126.

Twenty-fifth: It was averred that appellants and other railroad companies are among the largest, if not the largest, purchasers of yellow pine lumber.

Trans., Part I, p. 126.

Twenty-sixth: It was admitted that the cost of the production of yellow pine lumber in the items of raw material, labor and feed for stock had increased; but it was denied that there had been no increase in the prices of lumber.

Trans., Part I, p. 126.

Twenty-seventh: It was denied that appellants have for a considerable period "utterly" failed to furnish cars for the transportation of lumber; but it was averred that appellants furnished for the transportation of lumber and other traffic all the cars that they owned, or could procure by the exercise of the greatest diligence.

Trans., Part I, p. 127.

Twenty-eighth: It was denied that the cost to appellants and other railroad companies of furnishing transportation to the public has been constantly or at all reduced by reason of increased capacity of cars or locomotives, or by the use of modern appliances which dispense with employes necessary to operate trains.

Trans., Part I, p. 127.

Twenty-ninth: It was averred that the cost to appellants, and to other railroads in the Southern States, of fur-

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nishing transportation has materially increased during the last few years, on account of the material increase in the prices of lumber, crossties, iron, coal, wages and everything else which enters into the cost to railroads of furnishing transportation.

Trans., Part I, p. 127.

Thirtieth: It was denied that the fact that the rates upon yellow pine lumber from points in Mississippi are 1 cent lower than from certain Georgia points to territory on and north of the Ohio River is productive of unjust discrimination or undue preference against Georgia shippers.

Trans., Part I, p. 128.

Thirty-first: It was admitted that within the past four years, to wit, from 1899 to 1903, the rates on lumber from points in South Georgia to points on the Ohio River have been increased 2 cents per hundred pounds, and from points in South Georgia to some of the points north of the Ohio River, the rates have been increased 3 cents per hundred pounds; but it was averred that to points north of the Ohio River a part of the 3 cents increase was due exclusively to the action of the lines north of that river.

Trans., Part I, p. 129.

Thirty-second: It was averred that the increase, previously made, in rates between points in Georgia and points on the Ohio River, was fully justified by the circumstances and conditions existing at the time said increase was made, among which were the fact that the market value of lumber manufactured in South Georgia had greatly increased and the fact that the cost to the railroads of furnishing transportation service had also greatly increased.

Trans., Part I, p. 129.

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Thirty-third: It was denied that yellow pine had been singled out to bear the burden of the increased rates; but it was averred, on the contrary, that rates have been increased on many other products; and in many instances to a greater extent than the entire increases heretofore made or proposed to be made on yellow pine lumber.

Trans., Part I, p. 129.

Thirty-fourth: It was denied that the then existing or the proposed rates on yellow pine lumber were greater or productive of more revenue to the carrier than the rates upon any other like product, weight, value, tonnage and cost of transportation considered.

Trans., Part I, p. 129.

Thirty-fifth: It was averred that the proposed increase of rates was well known to the appellees and other members of the Georgia Saw Mill Association to have been in contemplation at least sixty days prior to April 15, 1903, and that if appellees made any contracts thereafter, they made them with such knowledge before them.

Trans., Part I, pp. 130, 131.

Thirty-sixth: It was denied that appellants have failed to supply sufficient cars to move such lumber as was under contract prior to April 15, 1903.

Trans., Part I, p. 131.

Thirty-seventh: It was denied that the Southeastern Freight Association is a medium through which a lessening of competition is effected; and it was averred that there is no understanding, general or special, express or implied, under which any member of the said association is under the

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slightest obligation, legal or moral, to change its rates or to make its rates conform to the rates, views, rules or regulations of any other carrier, whether such other carrier be a member of said association or not.

Trans., Part I, p. 132.

On May 13, 1903, the Southeastern Freight Association, by S. F. Parrott, Chairman, for response to rule to show cause issued April 14, 1903, adopted each and every averment of the foregoing response of the railway companies appellant.

Trans., Part I, p. 147.

## VI.

### Original Proceedings in the Circuit Court—Hearing Upon Rule to Show Cause.

The cause came on to be heard before Judge Speer under the rule, and upon the original and amended bills, demurrer and response, whereupon numerous witnesses were examined orally, in open court, with large expense to the parties, and much labor to all concerned; and the Court, on the 16th day of May, 1903, after hearing affidavits and arguments of counsel, rendered a decree overruling the demurrer, sustaining the jurisdiction of the Court, and dissolving the temporary restraining order. Said decree provided among other things:

"In case the respondents shall enforce the rates complained of and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the Court will entertain a renewed application on the record as made and such appropriate addi-

tions thereto as may be proposed by either party, enjoining the enforcement of such rates pending the investigation by the Commission, unless otherwise dissolved, and on presentation to the Court of the report of the Commission such other action will be taken as will be conformable to law and the principles of equity."

Trans., Part I, pp. 203, 204.

Judge Speer delivered a written opinion in which he said he had no doubt of his jurisdiction to restrain the enforcement of rates made in violation of the Interstate Commerce Law, or of the Anti-Trust Law, where it was necessary to prevent irreparable injury and multiplied, continuous, vexatious and ineffective litigation.

Trans., Part I, p. 201, et seq.

The original bill with amendments being by said interlocutory decree retained in the files of the Court, the appellant railway companies thereafter filed on the 22d day of June, 1903, their joint and several answer to said original bill and amendments, not waiving the benefit of their demurrer, which had been overruled, but expressly reserving the benefit thereof. Said answer was substantially the same as their joint and several response to the rule to show cause, filed on May 12, 1903, and hereinbefore referred to.

Trans., Part I, p. 204, et seq.

On July 6, 1903, Samuel F. Parrott, Chairman Southeastern Freight Association, filed his separate answer to said original bill and amendments.

Trans., Part I, p. 266.

## VII.

### Original Proceedings in the Circuit Court—Renewed application for Injunction.

On the 22d day of June, 1903, after said restraining order had been dissolved, the appellants put into effect said advance in rates on yellow pine lumber from Georgia points to Ohio River destinations. Whereupon, on the 23d day of June, 1903, appellees, following the suggestion contained in that part of the interlocutory decree of May 16, 1903, above quoted, filed with the Interstate Commerce Commission their complaint, praying that said advance in the rates on lumber between certain designated points be declared to be unjust and unreasonable, and that the defendants (appellants), and each of them, be commanded to wholly cease and desist from continuing to exact and enforce the advanced rates complained of, and for such other and further order or orders as the Commission might deem necessary or that might appear to be required.

Trans., Part I, p. 254, et seq.

Having filed their complaint with the Interstate Commerce Commission, the appellees, by an amended bill filed June 26, 1903, made application to the Circuit Court for an interlocutory order or decree restraining and enjoining the charging of the advanced rates, pending the investigation instituted before the Interstate Commerce Commission, or until the further order of the Court.

In said amended bill it was admitted that the appellants had, after the dissolution of said restraining order, filed with the Interstate Commerce Commission, and had given

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public notice, that on June 22, 1903, a revised tariff of freight rates from certain points in Georgia to certain points in other States would be established and put into effect, increasing the rates 2 cents per one hundred pounds, and that in accordance therewith said advance in rates of 2 cents per one hundred pounds did become effective on the 22d day of June, 1903, and was then "in force."

Trans., Part I, pp, 251, 252.

To this amended bill, appellants, on July 6, 1903, filed in the Circuit Court a joint and several answer, admitting the facts recited in said amended bill; but not waiving the benefit of the demurrer theretofore filed to the original bill and overruled by the Court.

Trans., Part I, pp. 263-265.

The cause came on to be heard upon the original and amended bills, and the joint and several answers thereto, and after argument of counsel, the Court, on July 16, 1903, delivered its opinion, wherein it declined to grant the interlocutory order or decree prayed in the amended bill, to restrain and enjoin the charging of the advanced rates, pending the investigation instituted before the Interstate Commerce Commission: the Court being of opinion that it did not seem imperative to grant the extraordinary order sought, since all of the railways defendant were solvent, and could be required to make restitution of all sums exacted in excess of reasonable rates, if the contention of appellees should prevail.

Trans., Part I, p. 268, et seq.

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## VIII

### Proceedings Before the Interstate Commerce Commission.

The subject-matter of the complaint before the Interstate Commerce Commission was identical with that involved in the original bill filed in the Circuit Court, and the issues joined upon the pleadings before the Commission were substantially the same as the issues joined upon the pleadings in the Circuit Court, excepting, of course, the questions raised as to the Circuit Court's jurisdiction.

A large amount of testimony was taken by the parties before the Commission, and that which was taken on behalf of defendants (appellants) was in support of the following general propositions:

First: That the former rates had been accepted by them not because they were just and reasonably high, but because they were the highest that could be obtained in competition with yellow pine lumber produced in Arkansas, and sold in territory on and north of the Ohio River.

Second: That the rates formerly charged were made lower than they might reasonably and justly have been made, because of a depression in the lumber market on and north of the Ohio River, which existed for several years and which rendered it necessary for appellants to accept at that time unreasonably low rates in order to enable the Georgia lumber to compete at the prices then prevailing.

Third: That the earliest rates that were in force on lumber from Georgia to the territory on and north of the

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Ohio River, and some of which prevailed for several years, were higher, even under the competition referred to, than are the present rates including said advance of 2 cents per hundred pounds.

Fourth: That after the period of depression had passed, and the lumber market began to improve, the rates from Georgia were gradually advanced as the price of lumber advanced; and when the Arkansas roads advanced their rates to Cairo, Ill. (the pivotal point in the rate adjustment), to the extent of 2 cents per hundred pounds, appellants were enabled to make a similar advance from Georgia to Cairo.

Fifth: That the abnormal increase in the operating expenses of railways rendered an advance necessary, not only in the lumber rates, but in the rates upon many other commodities.

Sixth: That the advanced rates from Georgia are just and reasonable.

A bare majority of the Commission, however, held:

First: That where an advance is made in rates which have been long maintained, and the evidence shows that the traffic affected is large and important, and constantly increasing, the advance will be held unjust, unless it is satisfactorily explained.

Trans., Part II, p. 1015.

Second: That the abnormal increase in operating expenses of the railways defendant was due to the charging of amounts expended for permanent improvement and betterments to operating expenses; and that the amount of such

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expenditures made by the defendants in a few years, preceding and including the year of the advance in rates, was extraordinary, and would probably not be maintained in the future.

Trans., Part II, pp. 1049, 1050.

Third: That, admitting the rates to have been reduced on account of depression in the lumber trade, the carriers would secure sufficient participation in returning prosperity by the resultant enlargement of their business, without restoring rates to the figures which were in effect prior to the period of depression.

Trans., Part II, p. 1015.

Fourth: That the rates on lumber, prior to the advance of 2 cents complained of, were reasonably high, when compared with the rates on other commodities, analogous to lumber.

Trans., Part II, pp. 1015, 1016.

On February 7, 1905, the Commission issued its order declaring the advance of 2 cents per one hundred pounds established on June 22, 1903, to be excessive, unreasonable and unjust; and ordered the carriers to cease and desist on or before April 1, 1905, from further maintaining or enforcing said advance.

Trans., Part II, pp. 1057, 1058.

The alleged illegality of the Southeastern Freight Association, under the Sherman Anti-Trust Law, was made quite prominent by counsel for appellees in the proceedings before the Commission. While the Commission held that it was without jurisdiction to administer the Anti-Trust Act, it nevertheless held that it was competent for it to con-

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sider the so-called joint or concerted action of the appellants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, which it assumed to be the result of that action. It in effect found that because the advanced rate may be presumed to be higher than the rate which unrestrained or reckless competition would produce, said advanced rate was therefore unreasonably high; and it is evident upon reading the report and opinion, that the Commission was perhaps influenced to a greater extent in the conclusions which it reached upon the case as a whole, by the supposed suppression of competition, than by any other single element which entered into its consideration of the case.

Trans., Part II, pp. 1046, 1047.

## IX.

### Supplemental Proceedings in the Circuit Court—Petition.

On March 17, 1905, appellees, pursuant to leave granted by the Circuit Court in its order of May 16, 1903, presented their petition, which reviewed the successive steps in the cause before the Court and before the Commission, and prayed relief as follows:

"That the Court will grant an injunction against the defendants, and each of them, enjoining the enforcement of the advance in rates on lumber from Georgia points to Ohio River destinations, as prayed in the original bill."

"That on the record the Court will enter a final decree in favor of complainants, granting the relief prayed in the original bill."

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"That a rule may issue requiring the defendants, and each of them, to appear at a time and place to be designated by the Court, then and there to show cause why the relief prayed for in this petition and in the original bill should not be granted; and that in the meantime, and until the further order of the Court, the defendants, and each of them, be temporarily restrained from enforcing or continuing to enforce the said advance in rates on lumber between the points designated."

"That the Court will grant such other and further relief as the petitioners may be entitled to, or as the facts of the case may warrant."

Trans., Part I, p. 278, et seq.

On June 3, 1905, the railway companies appellant, not waiving the benefit of the demurrer theretofore filed by them and overruled by the Court, filed their joint and several answer to the petition filed March 17, 1905, in which it was averred that the findings of fact contained in the report and opinion of the Interstate Commerce Commission of February 7, 1905, were not sustained by the evidence introduced before the Commission, but were opposed to the weight of the evidence; that the conclusions of law contained in said report and opinion were erroneous; and that said report and opinion and the order issued by the Commission based upon said report and opinion were illegal and void, and should not be enforced.

Trans., Part III, p. 1066.

By a supplemental bill filed by appellees on April 27, 1905, it was prayed that restitution be decreed of all amounts paid in excess of the rates obtaining on April 15, 1903, with interest thereon at the legal rate; and that upon final

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decree the cause be referred to a Master, with direction to hear evidence, examine books and documents, and state an account showing specifically the amounts exacted in excess of the rates obtaining on April 15, 1903.

Trans., Part III, p. 1060, et seq.

To said supplemental bill, filed April 27, 1905, the railway companies appellant, on June 3, 1905, filed a demurrer, which was overruled, and the grounds of which were.

First: "That the said alleged supplemental bill doth show upon its face that the same was not filed in accordance with the rules of practice of this honorable Court, regulating the presentation and filing of supplemental bills, in that the same was not ordered filed upon motion, and after notice to these defendants, or either of them, nor upon a rules day of this honorable Court. Wherefore, these defendants say that said bill should be dismissed."

Second: "Because it doth appear in and by the said several matters and things set forth in said bill of complaint, that said matters and things therein set forth do not constitute the proper matter of a supplemental bill, nor such matter as that these defendants should be called upon to demur, plead or answer thereto as and for a supplemental bill of complaint."

Third: "Because it appears in and by the said alleged supplemental bill that the same was prematurely filed, in that it doth not appear that by any decree of any court the said rates complained of have been decreed to be unjust and unreasonable, or that the defendants or either of them failed and refused to make restitution of any rate or amount which

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nad been adjudged to be in excess of a just and reasonable rate."

Fourth: "Because there is no equity in said alleged supplemental bill."

Trans., Part III, pp. 1222, 1223.

By stipulation of counsel, the testimony taken before the Interstate Commerce Commission was filed in the cause in the Circuit Court, and upon the supplemental proceedings in the Circuit Court, additional affidavits were also admitted.

The affidavits on behalf of appellants showed, in brief, that owing to the rushing forward of orders in anticipation of the advance in freight rates which was to have been made effective on April 15, 1903, there was a lull in the business for a few months thereafter; that later in 1903, the lumber traffic was affected by the fact that the railroads for prudential reasons had ceased ordering cars and had curtailed their purchases of lumber for other purposes; that the conditions of the money market at that time affected building operations in other directions; that these conditions continued to prevail until some time in the first half of the year 1904, when an improvement began, and the railroads re-entered the market for new cars and large orders were placed.

Trans., Part III, pp. 1095, 1096, 1097.

Said affidavits on behalf of appellants further showed a material increase in prices of all grades of lumber in Northern and Southern markets in 1905, over 1903. On some grades of lumber, as shown by Willock's exhibit of Nashville prices, the increase in prices of 1905 over 1903 reached the astonishing figure of from $5 to $6.50 per thousand feet.

Trans., Part III, p. 1120, et seq.

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The testimony showed that the average increase in freight rate per thousand feet amounted to only about 55 cents.

Trans., Part II, pp. 731, 732, 733.

Said affidavits on behalf of appellants further showed a material increase in the movement of lumber in 1905 over 1903 and previous years via various railways to the territory on and north of the Ohio River.

Upon the record as thus made up, the cause came on for final hearing, and was argued orally and upon briefs.

On June 28, 1905, the Circuit Court filed its written opinion in the cause, sustaining the contention of appellees, which opinion will be found in Transcript, Part III, p. 1203, et seq; and on July 8, 1905, the Court entered its final decree.

Trans., Part III, pp. 1227-1229.

The appellants prayed and obtained an appeal to the United States Court of Appeals for the Fifth Circuit on July 8, 1905.

Trans., Part III, pp. 1244-1255.

## X.

### Proceedings in the United States Circuit Court of Appeals.

A majority of the United States Circuit Court of Appeals, on Dec. 15, 1906, affirmed the decree of the Circuit Court, but delivered no opinion.

Trans., Part III, pp. 1258, 1259,

The appellants appealed from said decree to this Court.

Trans., Part III, pp. 1260, 1261.

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## PART II.

### ASSIGNMENT OF ERRORS.

### XI.

The appellants, the Southern Railway Company (erroneously sued as the Southern Railway); the Atlantic Coast Line Railroad Company; the Lousiville & Nashville Railroad Company; the Nashville, Chattanooga & St. Louis Railway (erroneously sued as the Nashville, Chattanooga & St. Louis Railway Company); the Seaboard Air Line Railway (erroneously sued as the Seaboard Air Line Railway Company; the Central of Georgia Railway Company; the Georgia Southern & Florida Railway Company; the Macon & Birmingham Railway Company; the Southeastern Freight Association, and Samuel F. Parrott, Chairman of said Southeastern Freight Association, by Ed. Baxter, their solicitor, say that in the decree rendered by said Circuit Court of Appeals in the above entitled cause on the 15th day of December, 1906, and in the record and proceedings in said cause in said Court, there is manifest error, in this, to wit:

FIRST.

That said Circuit Court of Appeals erred in affirming the decree rendered in the above entitled cause on July 8th, 1905, by the Circuit Court of the United States for the Southern District of Georgia.

SECOND.

That said Circuit Court of Appeals erred in not reversing said decree rendered in said cause, July 8th, 1905, by said Circuit Court of the United States for the Southern District of Georgia.

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THIRD.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that in granting the prayer of said bill, said Circuit Court exercised the legislative function of making a rate; contrary to the provisions of the Constitution of the United States, which provides that legislative, executive and judicial functions shall be separate.

FOURTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that it was contrary to the Constitution of the United States for a Court to exercise the legislative function of making rates.

FIFTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that as pecuniary reparation was demanded in said bill, upon the allegation that the rates heretofore charged and collected from complainants were unreasonable in the past, such demand necessarily involves a trial by jury, guaranteed by the Constitution of the United States.

SIXTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that said Circuit Court erred in not sustaining the demurrer and dismissing the bill of complaint, thereby denying to the defendants the right to trial by jury.



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SEVENTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that said Circuit Court erred in overruling the demurrer, and sustaining the bill of complaint, on the ground of multiplicity of suits being thereby prevented; because the complainants, each and all of them, are separately interested in any amount which might be recovered by them respectively; and no one complainant is at all interested in any recovery which might be had by another complainant. Damages to be recovered in any suit will be different, and vary in amount as to each complainant. There is no common question of law involved common to each suit, and the Court should have found that equity is without jurisdiction, so far as the ground of preventing a multiplicity of suits is concerned.

EIGHTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed; for the reason that said Circuit Court erred in overruling the demurrer to said bill of complaint, on the theory that said bill involved a right aserted under the statute of the United States, entitled "An Act to regulate commerce and amendments thereto," because the procedure prescribed in said statute for the enforcement of a right thereby granted has not been followed in this cause.

NINTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said Circuit Court erred in sustaining the bill of complaint on the theory that the

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common law provided a remedy in the premises; for the reason that the necessary diversity of citizenship does not exist to give the Court jurisdiction to proceed under the common law.

TENTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said Circuit Court erred in trying the cause as if the complainants had an absolute right to trade, which could be protected by an injunction; whereas, the Court should have held, as a matter of law, that the right to trade is not an absolute right, but a qualified right, subject to the right of all other citizens of the United States to trade, subject to competition.

ELEVENTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed for the reason that said Circuit Court erred in overruling the demurrer and in sustaining said bill of complaint upon the theory, as averred in said bill, that defendants had violated the Federal law, to wit: an act entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," because, under the express provisions of said statute, a private citizen has no right to invoke the remedy of injunction given by said act; the same being exclusively granted to the United States, at the instance of the Attorney General of the United States.

TWELFTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed for the reason that said Circuit Court erred in overruling the demurrer and sustaining the bill; because

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some of the appellees are citizens of the same state as some of the appellants.

THIRTEENTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill of complaint be dismissed for the reason that said Circuit Court erred in not holding that the appellees do not come into a Court of Equity with clean hands, inasmuch as they are members of the Georgia Saw Mill Association, the by-laws and constitution of which constitute a contract or combination in the form of trust or otherwise, in contravention of the Act of Congress of July 2, 1890, known as the Anti-Trust Act, and that said appellees, acting through said association, have curtailed the output of the product of yellow pine, with the purpose and effect of increasing its prices by the elimination of competition.

FOURTEENTH.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that said bill be dismissed; for the reason that the said Circuit Court erred in retaining jurisdiction of said bill of complaint; because any decree based on the prayer of said bill would necessarily cause the Court of Equity to make contracts by and between the railway companies and the shippers of lumber, for the transportation of said lumber, instead of leaving the parties free to make their own contracts.

FIFTEENTH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court which decreed "that the advance in rates on lumber complained of in the bill and made effective by defendant railway companies on June 22, 1903, from lumber shipping points within the State of Geor-

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gia to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly designated as Ohio River points or crossings, was and is excessive, unreasonable and unjust, and in violation of the provisions of the Act of Congress known as the Act to Regulate Commerce and the amendments thereto, and that the rates and charges resulting from the said advance are likewise excessive, unreasonable and unjust, and in violation of the Act to Regulate Commerce"; because said advance in rates, as well as the rates and charges resulting from said advance, are not excessive, unreasonable or unjust, nor are they in violation of any of the provisions of the Act to Regulate Commerce or of the amendments thereto.

SIXTEENTH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court which decreed "that an injunction do issue, directed to the respondents, Southern Railway Company, Central of Georgia Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Seaboard Air Line Railway, Georgia Southern & Florida Railway Company, Macon & Birmingham Railway Company, their officers, agents and servants, commanding and strictly enjoining them jointly and severally to discontinue and to wholly desist from maintaining or enforcing the said advances in rates made effective on the 22d day of June, 1903, or either of them, in so far as they apply to shipments of lumber from points in Georgia to Ohio River destinations and points basing thereon"; because no ground was shown, either in the pleadings or in the proof, to justify the issuance of an injunction enjoining the appellants, jointly or severally, to discontinue or to desist from maintaining

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or enforcing the said advance in rates made effective on the 22d day of June, 1903, either in so far as applied to shipments of lumber from points in Georgia to Ohio River destinations or to points basing thereon.

SEVENTEENTH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court which decreed that said injunction issue, enjoining the appellants from maintaining or enforcing said advance in so far as it applied to shipments of lumber from points in Georgia to Ohio River destinations; because the charges made on shipments of lumber from points in Georgia to Ohio River destinations, when shipments are destined to points north of said river, are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor said Circuit Court had any jurisdiction to determine.

EIGHTEENTH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court which decreed that said injunction issue, enjoining the appellants from maintaining or enforcing said advance, in so far as it applied to points basing on Ohio River destinations; because the Interstate Commerce Commission only found that said advance in rates, made effective on the 22d day of June, 1903, from shipping points in Georgia to Ohio River crossings, was unreasonable and unjust, and it did not find that the rates from shipping points in Georgia to points basing on Ohio River crossings were either unreasonable or unjust, nor was there any evidence either before the Commission or the Court that would have justified such a finding.

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NINETEENTH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court, in which decree it was ordered that the pleadings and evidence in this cause be referred to the Standing Master, J. N. Talley, Esquire, "with instructions to ascertain the sum total of the increased rate paid by each of the complainants and other members of the Georgia Saw Mill Association to either or all of the defendant companies since the rate went into effect, and to the end of the litigation, and report such amount to the Court, in order that, pursuant to the stipulation made by the respondents in open Court, in case the complainants prevail, decree of restitution may be made"; because:

(a) There was nothing either in the pleadings or in the evidence which justified the ordering of any reference at all.

(b) Instead of ordering the Master to ascertain "the sum total of the increased rate" paid by each of the appellees, it should have done more than to order him to ascertain the sum total of so much of the 2 cents per hundred pounds advance in rates made effective on the 22d day of June, 1903, paid by each of the appellees as is unreasonable and unjust.

(c) No members of the Georgia Saw Mill Association, except the complainants, H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Co., Garbutt Lumber Company, Alapaha Lumber Company and Southern Pine Company, came in or had themselves made parties to this cause, prior to the rendition of said decree of July 8, 1905, and therefore no reference should have been made to ascertain the amounts paid by such other members.

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(d) Instead of ordering the Master to report the sum total of the increased rate paid "to the end of the litigation," he should not have been ordered to report any amount paid after the filing of the original bill in this cause.

(e) No stipulation was made by appellants, in open Court or elsewhere, that a decree of restitution may be made except in the event that complainants finally prevail; and whether complainants shall finally prevail cannot be ascertained until the appeal made in this cause by appellants has been determined by this Court.

TWENTIETH.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court, which decreed in effect that the Southeastern Freight Association is organized and operates under a contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations; whereas, the articles of said association and the procedure of the members of said association are not in any wise violative of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

TWENTY-FIRST.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court, which decreed in effect that said advance of 2 cents per hundred pounds in the rates on lumber charged by the appellants from shipping points in Georgia to the Ohio River crossings, made effective June 22, 1903, was made under circumstances and conditions

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which eliminated all competition between appellants, whereas the exact reverse is the truth in the case.

TWENTY-SECOND.

That said Circuit Court of Appeals erred in affirming said decree of the Circuit Court, which decreed in effect that the purpose of said Southeastern Freight Association is to fix and control the rates to be charged by each and all of its members for the railway transportation of freight; whereas, said association has no power whatever to fix or control the rates charged by any member of said association.

TWENTY-THIRD.

That said Circuit Court of Appeals erred in affirming said decree of said Circuit Court, which decreed in effect that the action of said association "is more authoritative than the firman of the Sultan or the ukase of the Czar"; whereas, said association has no authority whatever to make, fix or maintain rates to be charged by any member thereof.

Wherefore, the above named appellants in the above entitled cause, viz: the Southern Railway Company (erroneously sued as the Southern Railway); the Atlantic Coast Line Railroad Company; the Louisville & Nashville Railroad Company; the Nashville, Chattanooga & St. Louis Railway (erroneously sued as the Nashville, Chattanooga & St. Louis Railway Company); the Seaboard Air Line Railway (erroneously sued as the Seaboard Air Line Railway Company); the Central of Georgia Railway Company; the Georgia Southern & Florida Railway Company; the Macon & Birmingham Railway Company; the Southeastern Freight Association, and Samuel F. Parrott, Chairman of said South-

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eastern Freight Association, pray that the said decree of said United States Circuit Court of Appeals for the Fifth Circuit, rendered in the above entitled cause on the 15th day of December, 1906, be reversed, and that said Circuit Court of the United States for the Southern District of Georgia be ordered to enter a decree dismissing the bill of complaint filed in the above entitled cause in said Court by the said H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Company, Garbutt Lumber Company, Alapaha Lumber Company and Southern Pine Company against said appellants.

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## PART III.

### XII.

### THE CIRCUIT COURT HAD NO JURISDICTION OF THE CASE MADE BY THE ORIGINAL BILL.

His Honor Judge Speer, in his opinion rendered May 16, 1903, correctly said that "This is a case of no less novelty than importance."

Trans., Part I, p. 201.

The bill was filed by certain individuals and corporations, all of whom were citizens of the State of Georgia, against certain railroad companies, some of which were citizens of the same state.

The complainants (appellees) were manufacturers of yellow pine lumber in the States of Georgia, Florida and South Carolina, and the defendants (appellants) were common carriers engaged in the interstate transportation of lumber from points within to points without the State of Georgia.

The bill averred that each of the appellant railway companies had given notice that a revised tariff of freight rates on lumber from points in the State of Georgia to points in other states would be put into effect whereby the then existing rate on lumber would be increased 2 cents per hundred pounds, and that such increased rate would be put into effect unless restrained by an order of the Court. The bill averred that such increase would be unjust, unreasonable and arbitrary, and would prove destructive to the business of appellees.

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There is no averment in the bill that the appellant companies had filed with the Interstate Commerce Commission, or posted at their depots, any schedule or tariff putting said proposed increase into effect; and the object of the bill was to restrain "the defendants and each of them from putting into effect the proposed increase of rates or any increase of rates on yellow pine lumber from points within, to points without, the State of Georgia, such order to be effective until the further order of the Court."

Trans., Part I, pp. 17, 24.

Said bill was, so far as we are aware, the first attempt of a Circuit Court of the United States to assume jurisdiction to enjoin common carriers from putting into effect a proposed schedule or tariff of interstate rates before such schedule or tariff had been filed with the Interstate Commerce Commission, and, of course, before any action had been taken, or could have been taken by said Commission in regard to the reasonableness of such rates.

The practice inaugurated by Judge Speer is not only "novel," but useless and expensive, and directly in conflict with the practice in equity prescribed by the Act to Regulate Commerce.

The practice in equity prescribed by said Act, as it existed when said bill was filed, is briefly as follows:

(1) The first section prescribes that all charges shall be "reasonable and just."

(2) The Act then gives to the carrier the right, and makes it the carrier's duty, to suggest, in the first instance, such rates as it deems to be just and reasonable.

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(3) The sixth section of the Act requires that such rates as the carrier may suggest be in the form of a schedule or tariff, which shall be plainly printed in large type, and filed with the Interstate Commerce Commission; and copies thereof for the use of the public must be posted in every depot where passengers or freight are received for transportation. No proposed rate can become a legal rate unless it be specified in the schedule, nor until the schedule be filed with the Commission; no greater or less rate can be legally charged than is specified in the published schedule of rates filed with the Commission; and no advance can be made in a rate except after ten days notice to the Commission.

(4) The thirteenth section provides that any person, firm, corporation, etc., complaining of anything done or omitted to be done by any common carrier, etc., may apply to said Commission by a petition, and it is made the duty of the Commission to investigate the matters complained of.

(5) The fourteenth section provides that whenever an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto; and a copy of such report shall be furnished to the common carrier that may have been complained of.

(6) The fifteenth section provides that if the Commission shall find that anything has been done or omitted to be done in violation of the provisions of the Act, the Commission shall notify the common carrier to cease and desist from such violation within a reasonable specifled time.

(7) The sixteenth section provides that whenever any common carrier shall violate or refuse or neglect to obey or

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perform any lawful order or requirement of the Commission, not founded upon a controversy requiring a trial by jury, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply, in a summary way, by a petition, to the Circuit Court of the United States sitting in equity, etc., alleging such violation or disobedience, as the case may be, and the said court shall have power to hear and determine the matter speedily as a court of equity, but in such manner as to do justice in the premises.

The practice in equity above outlined, was, so far as we are aware, uniformly followed in the Circuit Courts of the United States sitting in equity, until the bill in this case was filed. The Circuit Courts have invariably waited until the Commission has acted before undertaking to interfere in the matter.

The case of the Texas & Pacific Ry. Co. v. the Abilene Cotton Oil Co., decided by this Court during the present term, involved "the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission, and published according to the requirements of the Act to Regulate Commerce, and which it was the duty of the carrier under the law to enforce as against shippers." See Advance Opinion, p. 5. This Court held "that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to Regulate Commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an

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established schedule, because the rates fixed therein are unreasonable, etc."

See Advance Opinion, p. 14.

This Court said in the course of its opinion:

"Let us, without going into detail, give an outline of the general scope of the Act, with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the Act established to accomplish the purposes which the law-makers had in view.

"The Act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end *the duty was imposed of establishing and publishing schedules of such rates.* It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the Act and the punishments which it imposed were directed not only against carriers, but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplish the result of producing the wrongful discriminations or preferences which the Act forbade. It was made the duty of carriers subject to the Act to file with the Interstate Commerce Commission created by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of car-

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riers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the Act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the Act. The Act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act.' Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission.'"

Advance Opinion, pp. 6, 7.

It will be noticed that the practice in equity prescribed by said Act, as above outlined by us, corresponds very closely with the practice at law prescribed by said Act as outlined by this Court in the extract just quoted.

In the case then before the Court the action was at law;

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whereas, in the case now before the Court, the action is in equity.

In the case then before the Court the carrier had filed its schedules with the Interstate Commerce Commission, and the action at law for reparation was brought before the Commission had passed upon the reasonableness of the rates; whereas, in the case now before the Court a bill in equity was filed to enjoin the carriers, in effect, from filing their schedules of proposed rates with the Commission, and the bill, of course, was filed before the Commission had passed upon the reasonableness of the rates.

In both cases the crucial error consisted in a court assuming jurisdiction to pass upon the reasonableness of interstate commerce rates in advance of the action of the Commission.

* * * * * * * * * *

The original bill cannot be sustained upon the theory that it was necessary to protect the appellees from irreparable injury. The proposed advance in rates could not possibly have injured the appellees until the schedules of said advanced rates were filed with the Interstate Commerce Commission, and became effective; and the very day on which said schedules filed with the Commission became effective, the appellees could have filed their complaint with the Commission, attacking the reasonableness of said advanced rates; and immediately upon the decision by the Commission they could have filed a bill in the United States Circuit Court to enforce the order of the Commission.

It is true that the advanced rates would have been in-

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effect from the date indicated in the schedules filed with the Commission until the Commission could have decided upon their reasonableness; but such delay is only the law's necessary delay, and cannot be considered as constituting irreparable injury.

In the case at bar the record shows that after the original bill was filed, and after the restraining order, granted under said bill, was dissolved, the appellants filed with the Interstate Commerce Commission their schedules making the proposed advanced rates effective June 22, 1903, and on the very next day, viz., June 23, 1903, the appellees filed their complaint with the Interstate Commerce Commission, challenging the reasonableness of said rates.

Trans., Part I, p. 252.

The case, without any fault either upon the part of the Commission, or of the litigants, was not decided by the Commission until February 7, 1905. (Trans., Part II, p. 1013.); and the Commission then ordered the appellants to cease and desist on or before April 1, 1905, from maintaining or enforcing said advance.

Trans., Part II, p. 1058.

The appellees instead of waiting until April 1, 1905, filed their petition in the Circuit Court on March 17, 1905, renewing the prayer for an injunction *under the original bill.*

In a word, under the scope of practice in equity prescribed by the Interstate Commerce Act, no undue delay can be obtained by the carrier; and only such delay is possible as is absolutely necessary to give to the Commission the time required to consider these complicated cases with the care

which their importance demands. Under no circumstances can the appellants be justly charged with any delay in this case.

But whatever the delay may have been, there was no danger whatever of such delay causing any pecuniary or business loss to the appellees. Their business could not have been injured, because, according to Judge Speer, they could have kept an account of their payments, and recovered back the amounts from the appellants. And all this could have been done without stopping the operation of their business for a moment.

Upon this point, His Honor, Judge Speer, in his opinion rendered July 16, 1903, said: "In the meantime it does not appear that the injury complainants will sustain will be irreparable. The respondents are all solvent, probably all of them highly prosperous railway corporations. It will be easily competent for the complainants to keep careful account of all the charges claimed to be unreasonable and excessive exacted by the defendants on shipments of lumber to the western territory described in the bill. If their contention shall be maintained, it will be competent for the court in its final decree to direct the respondents or either of them, to make restitution of sums thus exacted."

Trans., Part I, pp. 275, 276.

* * * * * * * * * *

The original bill cannot be sustained upon the theory that it was necessary to prevent the multiplicity of suits. On the contrary, if the practice inaugurated by the original bill in this cause shall be sustained by this Court, the effect of the practice will be to greatly multiply suits of this character.

If the appellees have the right to maintain the original bill filed in this cause, all other manufacturers or shippers of lumber in Georgia have the right to file similar bills in each of the district courts of that state; each of said courts would assume to pass upon the reasonableness of the rates in controversy; and we might have as many different decrees in regard to the reasonableness of said rates as there were judges before whom the cases were tried.

One judge might decide, as Judge Speer did, that the entire advance of 2 cents per hundred pounds was unreasonable; another judge might decide that the whole advance of 2 cents was reasonable; and another judge might decide that while an advance of 2 cents was unreasonable, an advance of 1 cent was reasonable; and the carriers in that territory would be at a loss to know what rates to charge, and the shippers would be at a loss to know what rates to pay.

In the case of Texas & Pacific Ry. v. Abilene Cotton Oil Co., above referred to, this Court said:

"For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question."

Advance Opinion, p. 8.

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## XIII.

### The Final Decree of the Circuit Court Cannot Be Sustained under the Petition Filed in This Cause on March 17, 1905.

The original bill was filed April 17, 1903; and on May 16, 1903, the cause was heard upon the original bill, the demurrer thereto, and the appellants' response to the rule show cause why an injunction should not be issued as prayed in the bill. At that hearing numerous witnesses were examined orally and by affidavit; the testimony was very voluminous and was presented, in the language of Judge Speer, "with large expense to the parties and much labor to all concerned."

His Honor, at that hearing, should have dismissed the original bill and taxed the appellees with the cost. But, instead of doing so, he erroneously sustained the demurrer; and while he refused the injunction which was in reality the only effective feature in the bill, he retained the cause in court, until the appellees could make application to the Interstate Commerce Commission "to redress their alleged grievance."

Trans., Part I, pp. 201-203.

If the original bill had been dismissed upon demurrer as it should have been, the appellees would have been free to file their complaint before the Interstate Commerce Commission, after the advanced rates went into effect, as they did do, on June 23, 1903.

Trans., Part I, pp. 254-260.

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After the Commission rendered its report and opinion ordering the appellants to cease and desist on or before the first day of April, 1905, from further enforcing the advance of 2 cents per 100 pounds, the appellees should thereafter have filed a new and independent petition under the 16th section of the Act to Regulate Commerce, either in the Circuit Court of the United States for the Southern District of Georgia, or in some other Circuit Court of the United States sitting in equity, alleging the violation or disobedience of the order of the Commission; praying the Court to enforce said order of the Commission; and to enjoin appellants "from further continuing such violation or disobedience of such order or requirement of said Commission and enjoining obedience to the same."

On March 17, 1905, which was nearly one month before the order of the Commission required the appellants to cease from charging the advanced rates, the appellees, instead of filing a new and independent petition, filed a petition in this cause; and while said petition does recite the decision and order made by the Commission, *it does not pray for the enforcement of said order at all.* On the contrary, it only prays for an injunction *under the original bill.* The exact language of the prayer of said petition is as follows:

"That the Court will grant an injunction against the defendants, and each of them, enjoining the enforcement of the advance in rates on lumber from Georgia points to Ohio River destinations, as *prayed in the original bill.*

That on the record the Court will enter a final decree in favor of the complainants, granting the relief *prayed in the original bill.*

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That a rule may issue requiring the defendants and each of them to appear at a time and place to be designated by the Court, then and there to show cause why the relief prayed for in this petition *and in the original bill* should not be granted, and that in the meantime, and until the further order of the Court, the defendants and each of them be temporarily restrained from enforcing or continuing to enforce the said advance in rates on lumber between the points designated.

"That the Court will grant such other and further relief as the petitioners may be entitled to or as the facts of the case warrant."

Trans. Part I, p. 280.

In other words, said petition was not filed under the 16th section of the Act to Regulate Commerce, nor in pursuance of the practice in equity prescribed by that Act.

Counsel for appellees staked their case from first to last, upon the single proposition that a circuit court of the United States sitting in equity has the jurisdiction to determine for itself, in advance of any action by the Interstate Commerce Commission, the reasonableness not only of interstate rates then actually in force, but to determine the reasonableness of certain proposed rates which were not then in force.

In the final decree rendered by Judge Speer on July 8, 1905, while it refers to the proceedings, opinion, report and order of the Interstate Commerce Commission, it does not attempt to enforce the order of the Commission nor to enjoin the appellants "from further continuing such violation

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or disobedience of such order or requirement of said Commission, and enjoining obedience to the same" which is the form of order prescribed by the 16th section of the Act, and which would doubtless have been used in the final decree, if the Court had intended to rest its jurisdiction on the power given to it by that section, to enforce the order of the Commission. His Honor, however, manifestly intended to adhere to his view of the law as expressed in his opinion overruling our demurrer, which was that he had the right, independent of any action of the Interstate Commerce Commission, and either before or after certain proposed rates were actually in effect, to determine for himself whether such rates were reasonable or not.

## XIV.

### The Rate Question Involved.

The real rate question involved in this case is as to the reasonableness of an increase of 2 cents per hundred pounds made effective June 22, 1903, in the proportions allowed to what are known as the "*intermediate*" roads, as their share of rates on lumber from shipping points in Georgia to the Ohio River crossings.

The following extracts from the majority report and opinion of the Commission in this case will explain what is meant by "*intermediate*" roads:

"The through rates to points beyond (the Ohio River) in the territory east of the Mississippi and north of the Ohio River, known as the 'Central Freight Association territory,' are made up of the full local rates of the roads north of the

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Ohio (which are not affected by the advance) as the proportions of those roads; and of whatever is left of the through rates, as the proportions of the roads south of the Ohio."

Trans., Part II, p. 1022.

"There are divisions of the rates south of the Ohio between what are termed the 'originating roads' on which the lumber is principally manufactured, and the roads '*intermediate*' between those originating roads and the Ohio River crossings. The amounts or divisions allowed the originating roads are large in proportion to the lengths of the hauls made by them, and in proportion to the balances of the rates left for the '*intermediate*' roads. For example, the Southern Railway allows the lines south of Macon from 5½ to 7½ cents out of the rate to the Ohio. This leaves as the proportion of the Southern out of the 16-cent rate from Group 2 to Cairo from 8½ to 10½, which yields a comparatively small rate per ton per mile."

. . . "The advance of 2 cents complained of in this case goes to the *intermediate* roads, north of Macon, Albany or Montgomery, and none of it to the originating roads, or to roads beyond the river."

Trans., Part II, p. 1025.

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## XV.

### THE MAJORITY OF THE COMMISSION ERRED IN HOLDING THAT THE RATES FROM GEORGIA TO THE OHIO RIVER ARE UNREASONABLE.

In said report and opinion the majority of the Commission said:

"We find and conclude that the said advance of 2 cents per hundred pounds in the rates on lumber from the said shipping points in Georgia to the said Ohio River crossings made effective June 22, 1903, was not warranted by the facts, circumstances and conditions disclosed by the testimony, and that the increased rates then put in force are unreasonable and unjust."

Trans., Part II, p. 1055.

On the contrary appellants aver and insist that said increase of 2 cents per hundred pounds in said rates was fully warranted by the facts, circumstances and conditions disclosed by the testimony; and that the rates then put in force are reasonable and just, and are not in violation of any law.

In the case of the Central Yellow Pine Association v. I. C. R. R. Co. et al., a majority of the Commission said:

"The question of the reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty."

10 I. C. Rep., p. 538.

In the same case, on page 539, the Commission said: "It is plain that until there be fixed, either by legislative enact-

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ment or judicial interpretation, some definite basis for the valuation of railroad property and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions" (i. e., questions as to the reasonableness of the rates).

The first section of the Act to Regulate Commerce enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

The second section provides for that class of cases where a difference in rates constitutes an unjust discrimination.

The third section provides for that class of cases where a difference in rates constitutes an undue preference.

The fourth section provides for that class of cases where a difference in rates constitutes a greater charge for a shorter than for a longer haul, etc., under substantially similar circumstances and conditions.

The first section provides for that class of cases where the question involved is whether certain rates are reasonable and just, *in and of themselves;* even though they do not constitute an unjust discrimination, nor an undue preference, nor a greater charge for a shorter than for a longer distance.

The phrase "just and reasonable *in and of themselves*" was used by this Court in the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 18, 19.

There is no difficulty in understanding what Congress meant in saying that rates must be "just and reasonable" *in*

*and of themselves;* but unfortunately Congress failed to enumerate directly the elements which should be taken into consideration in determining the reasonableness of rates "in and of themselves."

In the case of Van Patten v. C. M. & St. P. Ry. Co., 81 Fed. Rep., p. 545, it was held by District Judge Shiras that the Interstate Commerce Act provides for and prescribes indirectly a standard, by comparison with which, it may be determined whether a given rate is or is not to be deemed unreasonable (i. e., in and of itself) within the meaning of the act; and that standard, he says, is the rate adopted, printed, and kept posted, as required by the statute, by those engaged in the business, and subject to the effect of free competition. See also Kinnavey v. Terminal Asso., 81 Fed. Rep., p. 802, and T. & P. Ry. v. Mudd, 202 U. S., p. 242. Under the holding of Judge Shiras, the majority of the Commission erred in this case in deciding that said so-called advance of 2 cents per hundred pounds, effective June 22, 1903, makes the through rates from points in Georgia to the Ohio River unreasonably high in and of themselves; because there is no question but that said through rates were "adopted, printed and kept posted" by the respective appellants, as required by the Act to Regulate Commerce.

Although it may be true that the question of the reasonableness in and of itself of a rate on a single article of traffic "is one of almost insuperable difficulty," as stated by a majority of the Commission in 10 I. C. Rep., p. 538, appellants are advised and insist that such difficulty, however great, gives no authority to the Commission to solve it by mere arbitrary action. The question of the right of the Commission, under the original act, to fix future rates, by arbitrary action, was distinctly denied by this Court in the case of C. N. O. & T. P. Ry. v. I. C. C., 162 U. S., p. 197.

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## XVI.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because they are Controlled by Competition.

**The testimony shows that the rates on lumber from the shipping points in Georgia to the Ohio River crossings are materially and substantially affected, and, in fact, controlled by competition; and therefore they are reasonably low.**

The report and opinion in the case of the Central Yellow Pine Association v. I. C. R. R. Co. et al., 10 I. C. Rep., p. 510, stated as follows:

"The lumber producing districts which are concerned in the matters involved in this case may be divided into—

"First, territory west of the Mississippi, composed of Louisiana west of that river, and Arkansas and Texas;

"Second, Louisiana east of the river, Mississippi and part of Alabama, and,

"Third, Georgia, Florida and part of Alabama, called Southeastern territory.

"The lumber men in each of these districts compete in the sale of their products in the same markets, which are principally in the territory on and north of the Ohio River, and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, known as 'Central Freight Association territory.'"

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In the same case, on page 511, it was said:

"At Cairo, traffic from the mills in a large portion of the lumber producing district, west as well as east of the Mississippi River, meets or converges *en route* to destination, the line to Cairo being the short line from the greater part of those districts. The rates to the other Ohio River crossings, Evansville, Louisville and Cincinnati, are said to be based on Cairo; that is, they bear a fixed relation to the Cairo rate, being higher by certain amounts and being correspondingly advanced or reduced as the Cairo rate is advanced or reduced."

10 I. C. Rep., p. 511; C. Y. P. Assn. v. I. C. R. R. Co. et al.

In the case of Central Yellow Pine Association v. V. S. & P. R. Co. et al., it was stated as follows:

"Large quantities of yellow pine lumber are manufactured in the States of Arkansas, Louisiana and Texas. This lumber is similar to that produced in Mississippi and Alabama and competes with it in Northern markets. The territory mainly referred to in this proceeding is what is known as Central Freight Association territory, being, roughly speaking, the section lying north of the Ohio River and between the Mississippi upon the west and the line running through Buffalo and Pittsburg upon the east. As we learn from the testimony in this case, and also from that taken in other cases, recently heard by the Commission, rates from both sides of the Mississippi River into this territory upon yellow pine lumber are the same. *This relation was established after much competition and long controversy* for the purpose of admitting lumber from both sections upon terms of equality." . . . "The method of manufacturing and

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marketing this lumber is essentially identical in all parts of the South."

10 I. C. Rep., p. 195, C. Y. P. Assn. v. V. S. & P. R. Co et al.

The principal rail lines which compete for the carriage of lumber from the territory west of the Mississippi (composed of West Louisiana, Arkansas and Texas) are "the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain & Southern Railway Company and the Kansas City Southern Railway Company."

10 I. C. Rep., pp. 194, 195, C. Y. P. Assn. v. V. S. & P. R. Co. et al.

The principal rail lines which compete for the carriage of lumber from the territory composed of East Louisiana, Mississippi and part of Alabama are the Illinois Central Railroad Company, the Gulf & Ship Island Railroad Company, the Southern Railway Company, the Mobile & Ohio Railroad Company, the New Orleans & Northeastern Railroad Company, the Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Alabama & Vicksburg Railway Company, the Louisville & Nashville Railroad Company and the Mobile, Jackson & Kansas City Railroad Company.

10 I. C. Rep., p. 505, C. Y. P. Assn. v. I. C. R. R. Co. et al.

The principal rail lines which compete for the carriage of lumber from the territory composed of Georgia, Florida and part of Alabama, called Southeastern territory, are the Southern Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nash-

ville, Chattanooga & St. Louis Railway, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company.

10 I. C. Rep., p. 548, Tift v. Southern Ry. Co. et al.

It will be seen that the Southern Railway Company and the Louisville & Nashville Railroad Company are the only carriers that participate in the carriage of lumber from more than one of said territories; and that neither of those companies participates in the carriage of lumber from the territory west of the Mississippi River.

It will be seen from the foregoing extracts from the opinions of the Commission, quoted above, that the method of manufacturing and marketing lumber is essentially identical in all parts of the South; that the lumber from all three of the territories, as above described, is destined to the same markets north of the Ohio River; that at Cairo, traffic from the mills in a large portion of the lumber producing districts, west as well as east of the Mississippi River, meets or converges *en route* to destination at Cairo, the line to Cairo being the short line from the greater part of those districts; and it will also be seen that the rates to the Ohio River crossings other than Cairo (i. e., Evansville, Louisville and Cincinnati) are based on Cairo, or have a fixed relation to the Cairo rate, being higher by certain amounts, and being correspondingly advanced or reduced as the Cairo rate is advanced or reduced. It is also manifest from said extracts that the carriers from that territory which has the lowest average distance to Cairo, can fix the rate to Cairo; and the rate so fixed must be met by the carriers from the other two territories, or they must retire from the lumber traffic.

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In the majority report and opinion in this case, it was said:

"The distances to Cairo from lumber shipping points in Arkansas, Louisiana and Mississippi are less than from Georgia shipping points. The following appear to be approximately correct as average distances to Cairo, to wit:

"From Arkansas .....365 miles.
"From Mississippi .....412 miles.
"From Louisiana (taking Sibley as a central shipping point) .....499 miles.
"And from the principal Georgia shipping points.739 miles.
Trans., Part II, p. 1027.

The majority report and opinion in this case (Trans., Part II, p. 1023) shows that the rate from Group 2 of the Southern Railway in Georgia (which includes stations on the Southern Railway between Macon and Brunswick) to Cairo, is the same as the rate from Arkansas, viz., 16 cents; and it is manifest that appellants would not carry lumber from Group 2 of the Southern Railway to Cairo, a distance of 739 miles, for the same rate as is charged by the carriers from Arkansas for a distance of only 365 miles, unless appellants were forced to do so by effective and controlling competition.

Appellants having thus shown that competition from Arkansas controls the rates to Cairo, and the Commission having stated in the extracts above quoted that the rates to the other Ohio River crossings, viz., Evansville, Louisville and Cincinnati, have a fixed relation to the Cairo rate, and must be correspondingly advanced or reduced as the Cairo rate is advanced or reduced, it is manifest that the same

competition which controls the rate to Cairo equally controls the rates to Evansville, Louisville and Cincinnati.

Lumber produced in Georgia competes, north of the Ohio River, with white pine lumber produced in Wisconsin, Michigan, etc., and with fir and spruce lumber produced on the Pacific coast.

Lumber produced in Georgia may be shipped via all rail to, and beyond the Ohio River; and it may also be shipped via all rail, or rail and water, to New York and other Northeastern cities.

The rates charged by appellants from Georgia on lumber to, and beyond the Ohio River, are not only controllel by the rates which are accepted by rival lines carrying lumber to the same territory from the other lumber producing districts, but the rates from the Georgia mills to, and beyond the Ohio River, are controlled by the rates which are accepted by rival lines from the same mills to New York and the Northeast.

Diagram A, on the next succeeding page, shows the various lumber producing districts; the lumber consuming districts, and the principal lines which compete for the carriage of lumber from said lumber producing districts to said lumber consuming districts.

We anticipate that appellees will insist that by reason of some of appellants being members of the Southeastern Freight Association, there is no real *bona fide* competition existing; but we will hereinafter show that the articles of the Southeastern Freight Association (unlike those of the Trans-Missouri Freight Association and the Joint Traffic

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Association) do not suppress competition, nor destroy individual action.

Two of appellants, viz., the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, who participate in the carriage of lumber from shipping points in Georgia to the Ohio River, are not members of the Southeastern Freight Association; appellant, the Southern Railway Company, is the only member of said association that participates in the carriage of lumber from East Louisiana, Mississippi and Alabama; and none of the members of said association participate in the carriage of lumber from the territory west of the Mississippi.

None of the lines which carry lumber to points on and north of the Ohio River from the white pine district, comprising Wisconsin, Michigan, etc., and none of the lines which carry lumber from the fir and spruce districts of the Pacific coast are members of the Southeastern Freight Association.

We insist that it was error of law for the Commission, and the courts, to refuse to give to the fact that said rates are controlled by competition, the legal value to which it is entitled.

## XVII.

### Why the Rates from Georgia Points to Cairo are Made Lower than to Evansville, Louisville or Cincinnati.

While it has been hereinbefore generally explained by references to the report and opinion of the Commission that the adjustment of rates on lumber from Georgia territory to points on and north of the Ohio River has been influenced by the competition from Arkansas, it may be well before proceeding further to show how the matter works out in actual practice.

The lines north of the Ohio River publish their tariffs of rates on lumber, in which tariffs are shown the rates from Cairo, Evansville, Louisville and Cincinnati to thousands of points in the territory on and north of the Ohio River. The rates shown in said tariffs, though known as "arbitraries," in constructing rates from points south of the Ohio River to points north of that river, are, in fact, the local rates of the companies publishing the same. Said rates are exacted by the Northern lines on all lumber tendered them by their Southern and Southwestern connections at the Ohio River, regardless of the competitive circumstances and conditions which may surround the shipment as a through shipment, from point of origin in the South, or Southwest, to final destination in the North. In other words, none of the burden of equalizing the commercial or competitive conditions as between the Arkansas lumber producing territory, the Mississippi lumber producing territory, or the Georgia lumber producing territory is assumed by any of the carriers leading northward from the Ohio River.

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By reason of the fact that the yellow pine producing territory in Arkansas extends into a higher latitude than the lumber producing sections of Mississippi, Alabama and Georgia, the lines from Arkansas have always been able to maintain to Cairo a rate very much lower than the rates prevailing at the same time from Mississippi, Alabama and Georgia to other Ohio River crossings; and the lines extending from Mississippi, Alabama and Georgia to other Ohio River crossings, and the lines extending from Mississippi, Alabama and Georgia to Cairo, have been compelled at that point to meet the low rate from Arkansas. It has not, however, been found necessary in meeting the competition existing at Cairo to lower rates from Mississippi, Alabama and Georgia to Evansville, Louisville and Cincinnati correspondingly, since the lines from Arkansas do not reach said latter points, and since said latter points are too remote from Arkansas territory to be subject to the influences which exist at Cairo.

From Group 2, Southern Railway in Georgia, the present rate on lumber destined to stop at Cairo is 16 cents (the same as from Arkansas to Cairo), while from the same Group in Georgia the rate on lumber destined to stop at Evansville is 22 cents; at Louisville, 21 cents, and at Cincinnati, 23 cents.

Trans., Part II, p. 1926.

"When the Southern lines made that adjustment (i. e., the adjustment which made the rates to Cairo on lumber lower than the rates to Evansville, Louisville and Cincinnati), they departed from the relative basis of rates which had obtained for many years, not only as to lumber, but as to all other classes of traffic, and which obtains today, with

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the exception of lumber to the various Ohio River crossings—Cairo, Louisville, Cincinnati," etc.

It will be noted that the advantage of Cairo over Evansville, Louisville and Cincinnati ranges from 5 to 7 cents per hundred pounds; and the result of this advantage in rates south of the Ohio River is, that to practically all points of destination in Ohio, Indiana and Illinois, the rate from Georgia, Mississippi, Alabama or Arkansas to Cairo, added to the local rates of the northern lines from Cairo to points of destination, produces the lowest total through rates that can be formed via any Ohio River crossings.

It would, of course, have been possible for the lines from Georgia, Mississippi or Alabama territory, in their endeavor to meet the Arkansas competition, to have figured the through rates from the Arkansas territory to every point of destination in Ohio, Indiana and Illinois, and published a tariff of corresponding through rates from points in Georgia, Mississippi and Alabama; but it was simpler to publish the low rate of 16 cents from Georgia, Mississippi and Alabama points to Cairo (which was the same as the rate from Arkansas to Cairo), and form through rates by adding thereto the same local rates of the lines north of the Ohio River, which were being added to the Arkansas rate.

The publication of the 16-cent rate to Cairo from Georgia, Mississippi and Alabama should be viewed in its true aspect, namely, as a convenient method for the ready computation of through rates; and not as a means whereby the entire movement of the lumber traffic was expected to be concentrated upon Cairo, to the exclusion of other Ohio River crossings. It is, of course, not to the interest of all the

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Southern lines to actually route their lumber traffic via Cairo, for they may either not reach Cairo with their own rails, or may be deprived of their long haul if the lumber be routed via Cairo.

In routing lumber traffic from Georgia, Mississippi and Alabama territory to points north of the Ohio River via Cairo, the Southern lines up to Cairo receive as their proportion of the through rates the 16 cents herein referred to; because the 16 cents is a component part of the through rates to points of ultimate destination.

In routing lumber traffic, however, from Georgia, Mississippi and Alabama territory to points north of the Ohio River via Evansville, Louisville or Cincinnati, it is not possible for the Southern lines up to said crossings to get their regular published rates of 22, 21 and 23 cents respectively, which they charge on lumber destined to stop at said crossings; and in the division of through rates from points in Georgia, Mississippi and Alabama territory to points north of the Ohio River, the Southern lines reaching Evansville, Louisville and Cincinnati accept proportions which are materially less than 22, 21 and 23 cents respectively, and which vary within wide limits according to the ultimate point of destination, and according to the amount which the Northern line continuing the transportation from the Ohio River to destination may charge as its local rate from the particular Ohio River crossing via which the traffic moves.

For illustration, we will suppose that a shipment of lumber moves via the Southern Railway from Group 2, in Georgia, to Columbus, Ohio.

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Cincinnati is the gateway of the Southern Railway, and the lumber would actually move via Cincinnati; but the through rate would be made via Cairo.

The reason why the through rate would be made via Cairo, while the shipment would naturally move via Cincinnati, is because all through rates are made by combining the rates south of the Ohio River with the rates north of the river; and the combination via Cairo, in the case supposed, would be less than the combination via Cincinnati, as shown by the following figures, viz:

| | | |
|---|---|---|
| The rate from Group 2 of Southern Railway in Georgia to Cincinnati is | 23 | cents. |
| The rate from Cincinnati to Columbus is | 7½ | cents. |
| Total through rate, if made via Cincinnati | 30½ | cents. |
| The rate from Group 2 of Southern Railway in Georgia to Cairo is | 16 | cents. |
| The rate from Cairo to Columbus is | 13 | cents. |
| Total through rate, if made via Cairo | 29 | cents. |

The shipper gets the benefit of 1½ cents per 100 pounds by having the through rate made via Cairo, and he also gets the benefit of the shortest route by having the actual movement made via Cincinnati.

But the Southern Railway, instead of getting its full rate of 23 cents from Group 2 to Cincinnati, is forced by the competition at Cairo to accept as its proportion of the through rate 1½ cents less per 100 pounds than it could have charged if this competition at Cairo did not exist.

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## XVIII.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because the Average Rates per Ton per Mile from Georgia to the Ohio River are Lower than the Majority of Other Rates per Ton per Mile on Lumber.

The testimony shows that the average rate per ton per mile from shipping points in Georgia to points beyond the Ohio River is higher than the average rate per ton per mile from shipping points in Georgia to the Ohio River crossings.

Exhibit "O" to C. B. Compton's testimony contains a statement of the rates from 26 representative points of origin in Georgia and Florida to 38 representative points of destination in Ohio, Indiana, Pennsylvania and New York.

From each of said points of origin, to each of said points of destination, the through rate is shown; also the short line distance, and the distance via the L. & N. R. R. Said statement also shows the average rate per ton per mile from each of said points of origin, to all of said points of destination, via the short line, and via the L. & N. R. R. Said statement also shows that from all of said points of origin to all of said points of destination the average short line mileage is 906 miles; the mileage via L. & N. R. R. is 983 miles; the average rate is 28.1 cents; the average rate per ton per mile via the short line is 6.21 mills; and the average rate per ton per mile via the L. & N. R. R. is 5.72 mills.

Trans., Part II, pp. 671, 763, 764, 765.

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The majority report and opinion in this case (Trans., Part II, p. 1024) stated that "Group or rate basis No. 2 of the Southern Railway, in Georgia, as set forth in its lumber tariffs, embraces, among others, stations from Macon, Ga., to Brunswick, Ga., inclusive, the Hawkinsville Branch, Columbus and Fort Valley, Ga."

Said report and opinion (Trans., Part II, p. 1027), stated that the average distance to Cairo "from the principal Georgia shipping points is 739 miles;" in Trans., Part II, p. 1026, of said report and opinion, it is stated that the rate from Group 2 of the Southern Railway in Georgia (which includes stations on the Southern Railway between Macon and Brunswick) is 16 cents per hundred pounds; which makes the average rate per ton per mile from stations on the Southern Railway between Macon and Brunswick to Cairo 4.33 mills.

In other words, while the average rate per ton per mile from the principal shipping points in Georgia to points north of the Ohio River is from 5.72 mills to 6.21 mills, the average rate per ton per mile from the principal Georgia shipping points to Cairo, one of the Ohio River crossings, is only 4.33 mills.

Cairo is used for the purpose of comparison because it is the Ohio River crossing upon which most of the rates from Southern territory to points north of the Ohio River are based.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in

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Georgia (as that group is described above in this section) is less than the average rate per ton per mile received by the roads north of the Ohio River on Georgia lumber carried by appellants to the Ohio River.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "N," which shows the rates on Georgia lumber in carloads received by the lines north of the Ohio River, from Cairo to Cincinnati inclusive, to thirty-two representative points of destination in the territory north of the Ohio River.

Said statement shows the rates from each of said Ohio River crossings to each point of destination, the mileage, and the rate per ton per mile. It also shows the average rate from all of said crossings to each of said points of destination, and the average rate per ton per mile. It also shows the average mileage from all of said crossings to all of said destinations to be 317 miles; and the average rate per ton per mile to be 6.91 mills.

Trans., Part II, p. 673.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points in Ohio, Indiana, Illinois, Wisconsin and Michigan to New York City. Said last mentioned rates are charged in

what is known as Central Freight Association territory; and the report and opinion in this case (Trans., Part II, p. 1049) concedes "that because of the greater density of traffic in Central Freight Association territory and in Eastern territory, rates in general are made materially lower in those territories than in Southern territory."

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "S," which shows the rates on lumber in carloads to New York City from thirty representative points of shipment north of the Ohio River, in the States of Ohio, Indiana, Illinois, Wisconsin and Michigan. It also shows the short line distance; the rate, and the rate per ton per mile, from each of said points of shipment to New York City. It shows that the average distance is 911 miles; the average rate is 25.6 cents per hundred pounds, and the average rate per ton per mile is 5.6 mills.

Trans., Part II, pp. 674, 774, 775.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points in Minnesota and Wisconsin to Chicago.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "G," which shows the rates on lumber in carloads from ten representative points

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in Minnesota and Wisconsin to Chicago, Illinois. It shows that the average rate from all of said points of origin to Chicago is 10.8 cents per hundred pounds, the average distance 359.7 miles, and the average rate per ton per mile 6.03 mills.

Trans., Part II, pp. 657, 658, 743.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points in Arkansas, Texas and Louisiana to points in Illinois, Wisconsin, Indiana, Pennsylvania, New York, Missouri and Kentucky.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "Q," showing the rates on lumber from numerous representative points of origin in Arkansas, Texas and Louisiana to thirty-eight representative points of destination, in the States of Illinois, Wisconsin, Ohio, Kentucky, Indiana, Pennsylvania and New York, and also to St. Louis, Mo. Said statement shows the mileages and rates from said points of origin to said points of destination. It shows that the average mileage is 846 miles, and that the average rate per ton per mile is 6.59 mills.

Trans., Part II, pp. 671, 672, 770.

We have hereinbefore shown in this section that the

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average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points in Michigan and Wisconsin to points on the Missouri River and beyond.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "R," showing the rates on lumber from nine representative points of origin in Michigan and Wisconsin to eight representative points of destination on the Missouri River and beyond. Said statement shows the average short line distance to be 808 miles, the average rate to be 28.6 cents, and the average rate per ton per mile to be 7.1 mills.

Trans., Part II, pp. 673, 674, 773.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points on the Texas & Pacific Railway in Texas, Louisiana, and Arkansas to Missouri River points.

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In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "T," showing the rates on lumber in carloads, from stations on the Texas & Pacific Railway in Texas, Louisiana and Arkansas to Missouri River points. It shows the distance from Shreveport, La., which is fairly representative of the distances from said stations of origin to said points of destination. It also shows the rates from all of said points of origin to all of said points of destination. It also shows the average rate per ton per mile from all of said points of origin to all of said points of destination to be 7.37 mills.

Trans., Part II, pp. 672, 777.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from points in Michigan to points in Central Freight Association territory.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "F," showing the rates on pine lumber from points in Michigan to points in Central Freight Association territory, viz., Cincinnati, Louisville, Evansville, Cairo, Columbus, Cleveland, Indianapolis, Terre Haute, Pittsburg and Chicago. It shows the rate and distance from each of said points of origin to each of said points of destination. It shows that the average mileage

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from all of said points of origin to all of said points of destination is 389 miles. It shows that the average rate from all of said points of origin to all of said points of destination is 15.1 cents, and that the average rate per ton per mile from all of said points of origin to all of said points of destination is 7.8 mills per ton per mile.

Trans., Part II, pp. 656, 657, 742.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

* * * * * * * *

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from stations on the Texas & Pacific Railway, in Texas, Louisiana and Arkansas to Clayton, N. M., and Trinidad, Grey Creek, LaJunta, Pueblo and Denver, Col. It shows the distances from Shreveport, La., which is fairly representative of the distances from said stations of origin to said points of destination. It also shows the rates from all of said points of origin to all of said points of destination. It also shows the average rate per ton per mile from all of said points of origin to all of said points of destination to be 8.31 mills.

Trans., Part II, pp. 672, 777, 778.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

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The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from stations on the Norfolk & Western Railway to New York City, approved, in effect, by the Commission.

In the case of the National Wholesale Lumber Dealers' Association v. N. & W. Ry. Co. et al., 9 I. C. Rep., p. 90, certain rates on lumber from certain points on the N. & W. Ry. to New York City were complained of as being unreasonably high.

On page 90 of the report and opinion of the Commission in that case is a table showing the names of said stations, and the distances, rates per hundred pounds and rates per ton per mile on lumber, other than oak, from each of said points to New York City, from December 28, 1892, to the date of the hearing of said case. Said statement shows that at the date of said hearing the rates per ton per mile from said stations to New York, on lumber other than oak, varied from 7.8 mills to 8.8 mills.

The Commission ordered (see page 87) that there should be an aggregate reduction of 2½ cents per hundred pounds in said through rates. And after making said reduction, as ordered by the Commission, the rates per ton per mile, on lumber other than oak, from said stations to New York, varied from 7.1 mills to 7.1 mills.

9 I. C. Rep., pp. 87, 90, National Wholesale Lumber Dealers' Assn. v. N. & W. Ry. Co. et al.

We insist that after said reduction of 2½ cents per hun-



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dred pounds was made in said rates, as ordered by the Commission in said case, the rates as reduced were, in effect, approved by the Commission, and the rates per ton per mile resulting from the reduced rates varied, as just shown, from 7.1 mills to 7.4 mills.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

The Commission, in its report and opinion, in the case just cited, said that the lumber rates of the Norfolk & Western Railway should be somewhat lower than might be reasonable in distinctly Southern territory, and yet the average rates per ton per mile of the Norfolk & Western Railway on lumber in that case, even after making the reduction ordered by the Commission, are materially higher than the average rates per ton per mile charged by appellants from the principal Georgia shipping points to Cairo, on the Ohio River.

9 I. C. Rep., pp. 112, 113.

The testimony shows that the average rate per ton per mile to Cairo from Group 2 of the Southern Railway in Georgia (as that group is described above in this section) is less than the average rate per ton per mile on lumber from Camden, Ark., and Trinity, Tex., to Wichita, Kans., approved, in effect, by the Commission.

In the case of the Mayor, etc., of Wichita v. C. R. I. & P. Ry. Co. et al., 9 I. C. Rep., pp. 573, 579, certain rates on lumber from Camden to Wichita, and from Trinity to Wichita were complained of as being unreasonably high.

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On page 573 of the report and opinion of the Commission in that case, is a table showing the names of said stations, and the distances and rates per hundred pounds on lumber. The distance from Camden to Wichita is 607 miles, and from Trinity to Wichita the distance is 633 miles. The rate from both Camden and Trinity to Wichita was 28½ cents per hundred pounds. The Commission decided (see page 579) that any rate from Camden or Trinity to Wichita beyond 27½ cents was unreasonable, which amounted to a reduction in said rates of 1 cent per hundred pounds. Under the rate of 28½ cents, the rate per ton per mile from Camden to Wichita was 9.4 mills; and the rate per ton per mile from Trinity to Wichita was 9.3 mills. After the reduction of 1 cent per hundred pounds was made in said rates, as ordered by the Commission, they were reduced to 27½ cents per hundred pounds, and under said reduced rates the rate per ton per mile from Camden to Wichita became 9 mills, and the rate per ton per mile from Trinity to Wichita became 8.7 mills.

9 I. C. Rep., pp. 573, 579, Mayor, etc., of Wichita v. C. R. I. & P. Ry. et al.

We insist that after said reduction of 1 cent per hundred pounds was made in said rates, as ordered by the Commission in said case, the rates as reduced were, in effect, approved by the Commission, and the rates per ton per mile resulting from the reduced rates, varied, as just shown, from 8.7 mills to 9 mills.

We have hereinbefore shown in this section that the average rate per ton per mile from the principal Georgia shipping points to Cairo on the Ohio River is only 4.33 mills.

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We submit herewith a recapitulation of the foregoing comparisons between the lumber rates per ton per mile charged by appellants from the principal Georgia shipping points to Cairo, on the Ohio River, and the rates per ton per mile charged by other carriers for the transportation of lumber in other sections of the United States.

The average rate per ton per mile from Camden to Wichita, in effect, approved by the Commission .....9. mills

The average rate per ton per mile from Trinity to Wichita, in effect, approved by the Commission.8.7 mills

The average rate per ton per mile from stations on the T. & P. Railway in Texas, Louisiana and Arkansas, to points in New Mexico and Colorado .....8.31 mills

The average rate per ton per mile from points in Michigan to points in Central Freight Association territory .....7.8 mills

The average rate per ton per mile from stations on the T. & P. Railway, in Texas, Louisiana and Arkansas, to Missouri River points.....7.37 mills

The average rate per ton per mile from points in Michigan and Wisconsin to points on and beyond the Missouri River.....7.1 mills

The average rate per ton per mile from certain points on N. & W. Railway to New York, in effect, approved by the Commission.....7.1 mills

The average rate per ton per mile received by roads north of the Ohio River from Ohio River crossings to points north of the Ohio River...6.91 mills

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The average rate per ton per mile from points in Arkansas, Texas and Louisiana to points in Illinois, Wisconsin, Ohio, Kentucky, Indiana, Pennsylvania, New York, etc.....6.59 mills

The average rate per ton per mile via short line from points of origin in Georgia and Florida to points in Ohio, Indiana, Pennsylvania and New York .....6.21 mills

The average rate per ton per mile from points in Minnesota and Wisconsin to Chicago.....6.03 mills

The average rate per ton per mile via L. & N. Railroad from points of origin in Georgia and Florida to points in Ohio, Indiana, Pennsylvania and New York .....5.72 mills

The average rate per ton per mile from points in Ohio, Indiana, Illinois, Wisconsin and Michigan to New York City.....5.6 mills

The average rate per ton per mile from principal shipping points in Georgia to Cairo on Ohio River .....4.33 mills

It will be seen that the average rates per ton per mile used in the foregoing comparison represent lumber rates charged in Georgia, Florida, Texas, New Mexico, Kansas, Arkansas, Missouri, Minnesota, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania and New York.

It will be further seen that the average rate per ton per mile charged by appellants from the principal shipping points in Georgia to Cairo on the Ohio River, is less than any of the other rates per ton per mile with which it is compared. We insist that it was error of law for the Commission, and the courts, to refuse to give to said comparisons the legal value to which they are entitled.

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The legal value of comparisons between rates, on the question of the reasonableness of rates, was recognized by Judge MacDowell in the case of I. C. C. v. Southern Ry., 117 Fed. Rep., p. 745; affirmed 122 Fed. Rep., p. 800.

It was said by this court, in Cotting v. Kansas City Stockyards Co., that:

"In the absence of testimony to the contrary, a customary charge should be regarded as reasonable and rightful."
183 U. S., p. 98, Cotting v. K. C. Stockyards Co.

In the case at bar, the testimony shows that appellants' rates from the principal shipping points in Georgia to Cairo on the Ohio River, are less than the customary charges made for the transportation of lumber in many other sections of the United States. The Commission, however, declined to attach any legal significance whatever to that fact.

A case cited with approval by this Court in the Cotting case, held that:

"The law makes it the duty of every common carrier to receive and carry all goods . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when that amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained *by the amount commonly, or customarily paid for other like services.*"
183 U. S., p. 94.

The position of the Commission with respect to the value

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of comparisons for the purpose of determining the reasonableness of rates has been by no means consistent.

In the case of the Cattle Raisers' Assn. of Texas v. M. K. & T. Ry. et al., in which the reasonableness of the rates on cattle, which were the subject of complaint, was sought to be sustained by exhaustive comparisons with higher rates upon cattle in other sections of the United States and in Canada and Mexico, the Commission attached little weight to the comparisons, and said that their value was "not great."

11 I. C. Rep., pp. 338, 339.

In the case, however, of the National Wholesale Lumber Dealers' Association v. N. & W. Ry. et al., involving the reasonableness of lumber rates from points on the N. & W. Ry. to New York City, the Commission found that the rates from N. & W. points were higher than those from either C. & O. or B. & O. points to New York; and that the rates on lumber from Indiana and Michigan points to New York were upon the basis of rate per ton per mile relatively much less than from N. & W. points.

9 I. C. Rep., pp. 111, 113.

The Commission further compared the rates from N. & W. stations to New York with rates from Southern points to New York, and accounted for the fact that conditions generally in the South justified higher rates.

9 I. C. Rep., p. 112.

In said case, after instituting the comparisons mentioned, the Commission held that upon all the facts and circumstances the through rates from N. & W. stations to New

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York were unreasonable, and should be reduced 2½ cents per hundred pounds.

9 I. C. Rep., p. 87.

If comparisons are regarded by the Commission as of legal value for the purpose of reducing rates, it would seem but fair that the Commission should regard them as of legal value for the purpose of sustaining the reasonableness of existing rates, especially when the reasonableness of the existing rates has been, as in the present case, sustained by comparisons in an overwhelming manner.

## XX.

### The Rates from Georgia Points to the Ohio River are Reasonably Low; Because it is to the Interest of Appellants that They Should Be So.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia to the Ohio River crossings are just and reasonable, the fact that they have the strongest possible motive for keeping the rates down to a point low enough to allow the traffic to move; otherwise they would lose it altogether.

9 Ry. & Can. Traf. Cas. (Browne & Macnamara), pp. 114, 119. Ricketts Smith et al. v. Midland Ry. Co. et al.

In the case just cited, Collins, J., said:

"It is of vital importance to the defendants not to drive the trade away, and I think their enlightened self-interest

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may be trusted to prevent them doing so; and so far as I can form an opinion upon the statistics, they have not done so."

Ibid., p. 119.

The testimony in this case shows that appellants were the real pioneers in introducing Georgia lumber into the territory on and north of the Ohio River.

They undertook to foster the Southern yellow pine interests by introducing the Southern pine into the territory on and north of said river.

They systematically had their representatives undertake to set forth its merits in order that it might be introduced.

They met with very little success at first, but after many years of pioneer work they finally succeeded, by solicitation through their own agents, and by requiring in their specifications that car manufacturers should, in the manufacture of appellants' equipment, bridges and buildings, use the Southern pine.

The rates which they first put in were of course experimental, but from time to time, as necessity required it, appellants readjusted the rates so that the Southern pine lumber might be, and was, marketed in the territory on and north of the Ohio River.

Trans., Part II, pp. 647, 648, 681, 682, Compton.

No such favorable adjustment of rates was ever made to enable any other product from Georgia or Florida to

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move into the territory north of the Ohio River, or into any other territory.

Trans., Part II, p. 648, Compton.

We insist that it was error of law for the Commission, and the courts, to refuse to give to these facts the legal value to which they are entitled.

## XXI.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because the Georgia Lumber Interests Have Prospered Under the Rate Adjustments Made by Appellants.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia and Florida to the Ohio River crossings are just and reasonable, the fact that the lumber interests in Georgia and Florida have prospered under the rate adjustments made by appellants from time to time.

The lumber establishments in Georgia have increased from 532 in 1870 to 1,254 in 1900.

12 U. S. Census (1900), Vol. IX, Manufactures, Part III, pp. 807, 810.

The lumber capital in Georgia has increased from $1,718,473 in 1870, to $11,802,714 in 1900.

Same citation.

The lumber establishments in Florida have increased from 104 in 1870, to 416 in 1900.

Same citation.

The lumber capital in Florida has increased from $775,090 in 1870, to $14,937,693 in 1900.

Same citation.

We insist that it was error of law for the Commission, and the courts, to refuse to give to these facts the legal value to which they are entitled.

## XXII.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because the Percentage of Increase has been Greater in the Price of Lumber than in the Rates on Lumber.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia and Florida to the Ohio River crossings are just and reasonable, the fact that the percentage of increase has been greater in the price of lumber than in the rates on lumber.

The tables appearing in the report and opinion in this case (Trans., Part II, pp. 1030, 1031) show that the lowest point of depression in the Chicago lumber market was reached in 1897, and that the prices of lumber in the Chicago market steadily and continuously increased during 1898, 1899 and 1900; that there was a slight falling off in prices in 1901, and that in 1902 prices higher than any during the previous five years were reached.

To illustrate: The prices in Chicago for the first quarter of 1897 and 1902 were as follows:

| Grade | 1897. | 1902. | Percentage of Increase. |
|---|---|---|---|
| A | $12 00 | $22 50 to $23 50 | 91.6 |
| B | 10 00 | 18 50 to 19 50 | 90 |
| C | 15 50 | 19 50 to 22 00 | 34 |
| Average | | | 71.8 |

During the period from the first quarter of 1897 to the first quarter of 1902, there were only two increases of 1 cent each in the rates to Chicago on lumber from Group 1 in Georgia (same as group or rate basis No. 2 of the Southern Railway in Georgia). The rate from said group to Chicago in the first quarter of 1897, was 22 cents, and (including said increases) the rate from said group to Chicago in the first quarter of 1902 was 24 cents, which amounts to an increase of only 9.09 per cent.

Compton's affidavit, dated June 12, 1905, Trans., Part III, pp. 1137, 1140, 1141.

In other words, while the price of yellow pine lumber in the Chicago market, between the first quarter of 1897, and the first quarter of 1902, increased 71.8 per cent, the rate on lumber from said group in Georgia to Chicago increased only 9.09 per cent.

To further illustrate: The price of lumber in the Chicago market during the first quarter of 1897 and the first quarter of 1905 were as follows:

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| Grade | 1897. | 1905. | Percentage of Increase. |
|---|---|---|---|
| A | $12 00 | $20 00 to $22 00 | 75.00 |
| B | 10 00 | 18 50 to 19 50 | 90.00 |
| C | 15 50 | 20 50 to 21 50 | 35.5 |
| Average | | | 66.8 |

During the period from the first quarter of 1897 to the first quarter of 1905, there were two increases of 1 cent each and one increase of 2 cents (which latter increase is the one complained of in this case), making a total increase during that period of 4 cents in the rates to Chicago on lumber from Group 1 in Georgia (same as Group or Rate Basis No. 2 of the Southern Railway in Georgia). The rate from said group to Chicago in the first quarter of 1897 was 22 cents, and (including all three of said increases), the rate from said group to Chicago in the first quarter of 1905 was 26 cents, which amounts to an increase of only 18.1 per cent.

Compton's affidavit, dated June 12, 1905, Trans., Part III, pp. 1137, 1140-1143.

In other words, while the prices of yellow pine lumber in the Chicago market between the first quarter of 1897 and the first quarter of 1905 increased 66.8 per cent, the rates on lumber from said group in Georgia to Chicago increased (including the 2 cents increase complained of) only 18.1 per cent.

The testimony shows that between June 1, 1899, and April 1, 1903, there was a marked increase in the price of every one of twenty different grades of yellow pine lumber in St. Louis.

Trans., Part II, pp. 661, 745, Compton, Exhibit "I."

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The price of yellow pine lumber purchased by the Southern Railway for bridges increased between 1899 and 1903, 25.6 per cent.

Trans., Part II, pp. 550, 629, Green Exhibit "T."

The price of yellow pine lumber purchased by the Southern Railway for car repairs increased from 1899 to 1903, 46.4 per cent.

Trans., Part II, pp. 550, 629, Green Exhibit "T."

The average price of all yellow pine lumber purchased by the Southern Railway increased from 1898 to 1903, 48.87 per cent.

Trans., Part II, pp. 550, 551, 619, Green Exhibit "N."

The price of certain yellow pine lumber (dimension stuff) purchased by the Louisville & Nashville Railroad, increased from January, 1901, to March, 1903, 50 per cent.

Trans., Part II, pp. 675, 676, 784, Compton Exhibit "V."

The average cost of lumber purchased by the Central of Georgia Railway increased from January, 1895, to July, 1902, 56.2 per cent.

Trans., Part II, pp. 804, 805, 837, Winburn Exhibit 1.

We insist that it was error of law for the Commission, and the courts, to refuse to give to these facts the legal value to which they are entitled.

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## XXIII.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because the Transportation of Lumber is Exceptionally Expensive to the Carrier.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia to the Ohio River crossings are just and reasonable, the fact that the transportation of lumber is exceptionally expensive to the carrier.

From 50 to 61½ per cent of the lumber moves on flat cars.

Trans., Part II, p. 892, Menzies.
Trans., Part II, p. 875, Cutler.
Trans., Part II, pp. 538, 539, Green.

The flat cars are furnished at the request of the mill men; because they can be more cheaply loaded at the mill.

Trans., Part II, p. 815, Winburn.

Mr. Compton states that the shipper prefers the flat car, for the reason, among others, that it will cost him about 30 per cent less to load a flat car than to load a box car.

Trans., Part II, p. 642, Compton.

Box cars are better adapted to other freight than are flat cars.

Trans., Part II, p. 1041.

Therefore, the flat cars which are preferred by shippers for lumber constitute a special equipment which the carriers are compelled to provide for the lumber business.



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From 85 to 100 per cent of the flat cars are hauled South empty.

Trans., Part II, p. 469, Culp.
Trans., Part II, p. 802, Menzies.
Trans., Part II, p. 641, Compton.
Trans., Part II, p. 853, Capps.
Trans., Part II, p. 875, Cutler.

The carriers receive no revenue from moving a flat car to the South empty; but on the contrary, they have to pay for the use of said empties at the rate of 20 cents per day.

Trans., Part II, p. 539, Green.

We insist that it was error of law for the Commission, and the courts, to refuse to give to those facts the legal value to which they are entitled.

## XXIV.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because Lumber is the Least Profitable Traffic Handled by Appellants.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia to the Ohio River crossings are just and reasonable, the fact that lumber is the least profitable business handled by them.

Mr. Capps, of the Seaboard Air Line Railway, states that the lumber traffic from Georgia points to points on and north of the Ohio River, passing over that road, is the least profitable business which that company handles; and that its value

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is largely as interchange tonnage. In other words, the lines from the west terminating at Montgomery ordinarily divide their east-bound business between the Seaboard Air Line Railway, the Atlantic Coast Line Railroad and the Central of Georgia Railway, in the same proportions that those roads furnish west-bound tonnage to the western lines; and the lumber delivered by the Seaboard Air Line as west-bound tonnage is of some value in securing return tonnage of east-bound business carrying higher rates per ton per mile.

Trans., Part II, p. 851, Capps.

Mr. Compton, of the Louisville & Nashville Railroad Company, states that lumber is the lowest paying business which that company has on its rails, generally speaking.

Trans., Part II, p. 641, Compton.

Mr. Menzies, of the Atlantic Coast Line Railroad Company, states that while lumber constitutes 22 per cent of the tonnage of that company, it yields only 15 per cent of the total earnings; and that lumber is less profitable than other traffic handled by said company.

Trans., Part II, p. 892, Menzies.

Mr. Culp, of the Southern Railway Company, states that the average receipts per ton per mile of the Southern Railway are 9½ mills, whereas that company is hauling Georgia lumber up to the Ohio River at a rate approximating ½ a cent, i. e., 5 mills per ton per mile; and, from some of the lumber traffic, that railway obtains only 3 to 4 mills per ton per mile.

Mr. Culp further states that the average cost of operation on that railroad is 72 per cent of its earnings, which

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per cent applied to the average receipts per ton per mile (i. e., 9½ mills) shows that the average cost of operation per ton per mile amounts to nearly 7 mills, while the lumber traffic pays only from 3 to 5 mills per ton per mile.

Trans., Part II, p. 469, Culp.

We insist that it was error of law for the Commission, and the courts, to refuse to give to those facts the legal value to which they are entitled.

## XXV.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because Appellants' Operating Expenses have Materially Increased in Recent Years.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia and Florida, to the Ohio River crossings, are just and reasonable, the fact that their operating expenses have materially increased in recent years.

The report and opinion in this case (Trans., Part II, p. 1035) admits that appellants' operating expenses have increased from year to year. It says, however, that those increases are due to the growth of business resulting from the larger mileage operated.

Appellants will hereinafter show that the increase in their mileage in 1902 over 1901 was only 9-10th of 1 per cent, while the increase in their operating expenses in 1902 over 1901 was 9.9 per cent; and that while the increase in

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their mileage in 1903 over 1902 was 15.3 per cent, the increase in their operating expenses in 1903 over 1902 was 25.9 per cent.

Said report and opinion (Trans., Part II, p. 1035) admits that "the increase in operating expenses is also attributable *in part* to increases in wages and labor paid by the roads, and in the prices of material and equipment required by them, such as steel rails, coal, locomotives and cars of all kinds."

By the use of the phrase "attributable *in part*" it seems that the object of the extract just quoted was to convey the impression that the increase in operating expenses attributable to increases in wages and prices of material and equipment was quite insignificant.

On the contrary, the testimony shows that the cost of operating railroads in the South, "has *very greatly* increased."

Trans., Part II, p. 552, Green.

Mr. Winburn, of the Central of Georgia Railway, states that certain specified materials and supplies purchased by said company in 1902 cost the company $343,265.66, more than the same material and supplies would have cost if the company had been able to purchase them at the prices of 1897; and that $64,720.60 of said sum represents the increased price of lumber, the benefit of which went to the lumber producers. He states that said sum of $343,265.66 by no means represents all the increased cost to that company of materials and supplies purchased; but shows only

those articles the exact figures for which had been obtainable by the auditor within the limited time at his disposal.
Trans., Part II, pp. 810, 839, Winburn Exhibit "B."

The cost of lumber purchased by the Southern Railway increased as follows:

1899 over 1898.....16.3 per cent.
1900 over 1899.....84. per cent.
1901 over 1900.....13.9 per cent.
1902 over 1901.....12.1 per cent.
Trans., Part II, pp. 552, 621, Green Exhibit "P."

The cost of fuel purchased by the Southern Railway increased as follows:

1899 over 1898.....18.38 per cent.
1900 over 1899.....53.66 per cent.
1901 over 1900.....20.11 per cent.
1902 over 1901.....15.56 per cent.
Trans., Part II, pp. 552, 622, Green Exhibit "P."

The cost of wages on the Southern Railway increased as follows:

1899 over 1898.....17.25 per cent.
1900 over 1899.....21.43 per cent.
1901 over 1900..... 6.53 per cent.
1902 over 1901.....14.47 per cent.
Trans., Part II, pp. 552, 623, 624, Green Exhibit "P."

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The cost of steel rails on the Southern Railway increased as follows:

1902 over 1898.....57.75 per cent.
Trans., Part II, pp. 552, 625, Green Exhibit "P."

The cost of equipment on the Southern Railway has increased as follows:

Locomotives: 1902 over 1898.....26.5 per cent.
Box cars: 1902 over 1899.....38.4 per cent.
Flat cars: 1902 over 1898.....67.8 per cent.
Coal cars: 1902 over 1898.....83.6 per cent.
Trans., Part II, pp. 552, 625, Green Exhibit "P."

The increased cost of equipment was not entirely due to the increased size of locomotives and cars, but was due to the increased cost of material and labor used in constructing them.
Trans., Part II, p. 554, Green.

The cost of materials and supplies on the Central of Georgia Railway increased from 1897 to 1902 on an average 38.27 per cent.
Trans., Part II, pp. 810, 839, 840, Winburn, Exhibit "B."

We insist that it was error of law for the Commission, and the courts, to refuse to give to those facts the legal value to which they are entitled.

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## XXVI.

### The Rates from Georgia Points to the Ohio River are Reasonably Low, Because Appellants' Entire Schedule of Rates, Including the Rates in Controversy, do Not Pay a Fair Return upon a Fair Capitalization of Appellants' Roads.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia and Florida to the Ohio River crossings are just and reasonable, the fact that their respective schedules of rates taken as a whole and including their respective rates on lumber complained of in this case, do not pay a fair return upon a fair capitalization of their respective roads.

The report and opinion in this case (Trans., Part II, pp. 1039, 1040) sets forth certain facts relative to the financial condition of the principal appellants, and says that "the financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made."

The financial condition of the principal appellants may have steadily improved for a number of years up to and including the year 1903; and yet their previous financial condition may have been such that even with the improvement referred to, their schedule of rates, as a whole, did not, even in 1903, pay a fair return upon a fair capitalization of their respective roads.

The Interstate Commerce Commission publishes each

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year what is known as a "Preliminary Report on the Income Account of Railways in the United States." It contains headings as follows:

Column No. 1—"Abbreviated name of road."
Column No. 2—"Total mileage operated."
Column No. 3—"Earnings—Passenger."
Column No. 4—"Earnings—Freight."
Column No. 5—"Total Gross, including other earnings from operations."
Column No. 6—"Operating Expenses."
Column No. 7—"Net Earnings—1903" (arrived at by deducting column 6 from column 5).
Column No. 8—"Net Earnings—1902."
Column No. 9—"Income from Other Sources."
Column No. 10—"Total Income (net earnings and income from other sources)" arrived at by adding column 9 to column 7.
Column No. 11—"Total Deductions from Income."
Column No. 12—"Dividends—1903."
Column No. 13—"Dividends—1902."
Column No. 14—"Surplus from Operations of Year" (arrived at by deducting the sum of columns 11 and 12 from column 10).

Preliminary Report on Income Account of Railways in the United States for the year ending June 30, 1903, pages 62, 63.

Column 10 shows the "total income" (including not only the net earnings, which are arrived at by deducting operating expenses from gross earnings from operation, but also the income from all other sources); and therefore it shows the total amount (after paying operating expenses) that is

available to the company for the payment of fixed charges and dividends. In other words, it shows all that is left to the stockholders with which to pay their fixed charges and dividends.

The fixed charges consist of "interest on funded debt," "interest on interest-bearing current liabilities," "rents paid for lease of road," "taxes," "permanent improvements charged to income account," and "other deductions."

Statistics of Rys. in the U. S., 1903, pp. 540, 541.

We have caused to be compiled from the "Preliminary Report on the Income Account of Railways in the United States for the year ending June 30, 1903," a statement in which column A is the same as column 10 of said report, and column B is the same as column 2 of said report. It shows for each of appellants for the year ending June 30, 1903, the "total income (net earnings and income from other sources)," and the "mileage," and by dividing the "total income (net earnings and income from other sources)," by "the mileage," it shows in column C, the "total income (net earnings and income from other sources) *per mile of road* operated;" and in column D it shows the "capitalization upon which the total income per mile of road will pay 6 per cent."

Said statement further shows that the "average capitalization" of appellants' roads upon which the total income per mile of road will pay 6 per cent, is $33,309. Said statement is as follows:

STATEMENT.

| Railroad | A<br>Total Income (Net Earnings and Income from Other Sources) | B<br>Mileage | C<br>Total Income (Net Earnings and Income from Other Sources) per Mile of Road Operated | D<br>Capitalization upon which the Total Income per Mile of Road will Pay 6 per Cent |
|---|---|---|---|---|
| L. & N. ..... | (63) $12,664,171 | (62) 3,491 | $3,628 | $60,466 |
| A. C. L. ..... | (63) 8,940,102 | (62) 4,139 | 2,159 | 35,983 |
| Southern Ry... | (63) 14,099,139 | (62) 7,137 | 1,975 | 32,916 |
| S. A. L. ..... | (63) 3,840,478 | (62) 2,611 | 1,471 | 24,516 |
| G. S. & F. ..... | (39) 470,896 | (38) 395 | 1,192 | 19,866 |
| C. of Ga ..... | (39) 2,534,152 | (38) 1,860 | 1,362 | 22,700 |
| N. C. & St. L... | (41) 2,632,831 | (40) 1,195 | 2,203 | 36,716 |
| M. & B* ..... | ..... | ..... | ..... | ..... |
| Average ..... | | | ..... | $33,309 |

NOTE—Figures prefixed in parenthesis refer to pages of "Preliminary Report on the Income Account of Railways in the United States for the year ending June 30, 1903."

We submit that said "average capitalization" of $33,309 per mile of road is a low capitalization for appellants' roads; because the average capitalization per mile of road of all the railroads in the United States in the year 1903 was $63,186.

Statistics of Rys. in U. S., 1903, p. 56.

The railways of the United States are divided into ten groups, and the average capitalization of appellants' roads, as shown in the above table, viz., $33,309, is less than the average capitalization per mile of line in any one of said groups.

Statistics of Rys. in U. S., 1903, p. 56.

*M. & B. Ry. not shown in said report, but operated in 1903 at a deficit of $45,949 See Report and Opinion in this case, Trans., p. 1040.

A map of said groups will be found as the frontispiece to the Statistics of Railways in the United States, 1903.

We submit that 6 per cent is not more than a fair return upon a fair capitalization of appellants' roads.

The Georgia Railroad Commission, in its second semi-annual report, page 21, said:

"The Railroad Commission inclines to the view that 8 per cent would be about the proper rate, viz.: 7 per cent as lawful interest and 1 per cent for contingencies, spent on road and other investments."

In the case of L. & N. R. R. Co. v. Browne et al., 123 Fed. Rep., 951, Judge Pardee said:

"It seems reasonably clear to me that, if entitled to earn something under the above conditions, it (a railroad company) is entitled to earn under the same conditions a compensatory amount equal, at least, to the usual and legal rate of interest in the locality where the railroad is situated."

123 Fed Rep., 951, L. & N. R. R. Co. v. Browne.

See also 124 Fed Rep., 599, Spring Val. Waterworks v. San Francisco.

78 Fed. Rep., p. 238, 17th headnote, Southern Pacific Co. v. R. R. Commission.

90 Fed Rep., 683, headnotes 2 and 3, Metropolitan Trust Co. v. H. & T. C. R. Co.

We insist that it was error of law for the Commission, and the courts, to refuse to give to those facts the legal value to which they are entitled.

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## XXVII.

### The Rates from Georgia Points to the Ohio River Are, in the Opinion of Competent Experts, Reasonably Low.

Appellants submit as further evidence that their rates on lumber from shipping points in Georgia and Florida, to the Ohio River crossings, are just and reasonable, the fact that the following-named experts state that, in their opinion, said rates are reasonably low, and they state as the reasons upon which they base their opinions, the facts set forth hereinabove in Sections XVI to XXVI inclusive.

We insist that the opinions of said experts, while not controlling, are entitled to great weight, especially as they are opposed by only three of the five experts, constituting the Commission.

93 Fed Rep., pp. 88, 89, I. C. C. v. W. & A. R. R. Co.

The experts introduced by the appellants are as follows:

Powell, Trans., Part II, p. 913.
Green, Trans., Part II, pp. 563, 564.
Winburn, Trans., Part II, p. 819.
Compton, Trans., Part II, pp. 697, 698.
Menzies, Trans., Part II, p. 893.
Culp, Trans., Part II, pp. 467, 468, 469, 470, 486, 487.

We insist that it was error of law for the Commission, and the courts, to refuse to give to those facts the legal value to which they are entitled.

## XXVIII.

### The Increase of Two Cents per Hundred Pounds Made Effective June 22, 1903, was Justified by the Change in Competitive Conditions.

In the report and opinion of the majority of the Commission in this case, it was said:

"The maintenance of materially lower rates for such long periods of time bring this case within the rule that, 'Where an advance is made in rates which have long been maintained, and the evidence shows that the traffic affected is large, important and constantly increasing, the advance will be held unjust *unless it is satisfactorily explained.*'"

Trans., Part II, pp. 1047, 1048.

Appellants insist that said increase of 2 cents per one hundred pounds (which is the only increase that is in controversy in this case) is "satisfactorily explained," and fully justified, by the change in competitive conditions which occurred at or about the time said increase was made.

It is conceded by the majority of the Commission that prior to May 17, 1894, the rates to Cairo from Georgia Group 2 of the Southern Railway, were higher by 3 cents per one hundred pounds than the rates from Arkansas.

Trans., Part II, pp. 1026, 1027.

It is conceded by the majority of the Commission that on May 17, 1894, appellants reduced their rates from said Georgia Group 2 to Cairo, 3 cents per hundred pounds, so as to make them the same as the rates from Arkansas, and thereby meet said Arkansas competition.

Trans., Part II, pp. 1026, 1027.

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It is conceded by the majority of the Commission that from May 17, 1894, down to the time when said increase of 2 cents per hundred pounds was made, appellants continued to meet said Arkansas competition by accepting as low rates to Cairo from said Georgia Group 2 as were accepted by the competing lines leading from Arkansas to Cairo.

Trans., Part II, p. 1027.

On April 15, 1903, said competing lines leading from Arkansas to Cairo increased their rates 2 cents per hundred pounds (Trans., Part II, p. 1023); and it was that fact which enabled appellants to make said increase of 2 cents per hundred pounds from Georgia to Cairo complained of in this case.

In other words, if it had not been for the Arkansas competition, appellants would not have been forced to reduce their rates 3 cents per hundred pounds on May 17, 1894; and if the competing lines from Arkansas had not increased their rates 2 cents per hundred pounds on April 15, 1903, it would have been impossible for appellants on June 22, 1903, to have made the increase of 2 cents per hundred pounds in their rates from Georgia to Cairo complained of in this case.

As it was, the increase of 2 cents per hundred pounds which appellants were enabled to make on June 22, 1903, even when added to an increase of 1 cent per hundred pounds, which was previously made on September 8, 1899, only equaled the reduction of 3 cents per hundred pounds which the Arkansas competition forced the appellants to make on May 17,1894.

The rates charged by appellants, prior to said increase

of 2 cents per hundred pounds, were accepted by them, not as being reasonably high, but as being the highest they could secure under the stress of Arkansas competition; and we insist that it was error of law for the Commission, and the Courts, to refuse to distinguish between a case where rates are accepted by a carrier voluntarily, and this case, where the rates maintained by appellants prior to June 22, 1903, were forced upon them by competition.

## XXIX.

### The Increase of Two Cents per Hundred Pounds, Made Effective June 22, 1903, was Justified by the Change in the Condition of the Lumber Market.

Appellants insist that said increase of 2 cents per hundred pounds is satisfactorily explained, and fully justified, by the fact that the rates previously charged by them were for a number of years materially affected by a serious depression, which during that period existed in the lumber market; and appellants reduced their rates during that period in order to enable the Georgia lumber to continue in the market at the depressed prices.

The majority report and opinion, Trans., Part II, p. 1030, said:

"From January, 1892, to June 30, 1903, a period of over eleven years terminating at the time of the advance in rate, there were many variations in the prices. They appear to have been lowest from 1895 to 1899, both inclusive."

On the hearing before the Commission Mr. C. B. Comp-

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ton prepared as Exhibit "C" to his testimony a statement showing the prices of yellow pine lumber in the Chicago market, and also showing the freight rates from Group 1 in Georgia to Chicago.

Trans., Part II, pp. 649, 736.

It shows the rates, as they existed from time to time, and the prices of lumber as they existed during the same time; and it shows that the rates from Group 1 in Georgia to Chicago were kept in line, substantially, with the market prices of lumber at Chicago.

For instance, it shows that the price of Grade "A" lumber in Chicago during the first quarter of 1891 was $23.00-$25.00 per thousand; and the rate on flat cars from Group 1 in Georgia to Chicago was 28 cents per hundred pounds.

It shows that the price of Grade "A" lumber in Chicago fell from $23.00-$25.00 per thousand in the first quarter of 1891, to $21.00-$22.00 in the last quarter of 1891; and that the rate on flat cars on November 28, 1891, was reduced from 28 cents to 24 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 24 cents until May 17, 1894; that the price of Grade "A" lumber in Chicago had fallen from $21.00-$22.00 in the fourth quarter of 1891 to $15.00-$16.00 on May 17, 1894, when the rate on lumber in flat cars was reduced from 24 to 22 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 22 cents from May 17, 1894, to September 8, 1899; that the price of Grade "A" lumber in Chicago increased from

$15.00-$16.00 on May 17, 1894, to $20.75-$21.75 on September 8, 1899, when the rate on lumber in flat cars was increased to 23 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 23 cents per hundred pounds from September 8, 1899, to January 1, 1900; that the price of Grade "A" lumber in Chicago increased from $20.75-$21.75 on September 8, 1899, to $21.25-$22.25 on January 1, 1900, when the rate on lumber in flat cars was increased to 24 cents per hundred pounds.

It shows, speaking generally, that while the rates did not follow every fluctuation in prices, they did decrease with the general decrease in the price of lumber, and in that way assisted the Georgia saw-mill men in meeting the depression in the lumber market.

In other words, the rates charged by appellants prior to said increase of 2 cents per hundred pounds complained of in this case were accepted by them not as being reasonably high, but as being the highest that they could secure under the depressed condition of the lumber market.

The depression in the lumber market was afterwards relieved; and appellants supposed that as they had reduced their rates to meet said depression, it was just and reasonable that they should increase their rates as said depression became less and less.

In Re Proposed Advances in Freight Rates, 9 I. C. Rep., p. 386, Commissioner Prouty, who concurred in the majority opinion in this case, speaking of advances in iron rates, said:

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"Where reductions have been made by reason of commercial depression, it is difficult to see why corresponding advances may not with propriety occur when that depression is relieved." . . . "If the railways reduced their rates during these periods at the solicitation of manufacturers, it seems no more than just that they should be permitted to raise them now, when the conditions of that industry permits it."

And on page 439, of said opinion, he said:

"Our conclusion as to the rates involved in this investigation, is that since the reduction in the iron schedule was the result of commercial conditions, that rate may have been properly increased, owing to the subsequent change in these conditions."

9 I. C. Rep., pp. 386, 439.

We insist that it was error of law for the Commission and the Courts to refuse to apply in this case the rule of law which Commissioner Prouty recognized as just in the case last cited.

## XXX

### During the Period from January 1, 1891, to June 22, 1903, the Aggregate Increase in Rates Was Less Than the Aggregate Reduction in Rates.

On the hearing before the Commission, Mr. C. B. Compton filed as Exhibit "C" to his testimony (Trans., Part II, pp. 736-738) a statement showing every increase and every reduction in the lumber rates from Group 1 in Georgia to Chicago, made between January 1, 1891, and March 31,

1903; and it is conceded that the only increase that has been made since March 31, 1903, was the increase of 2 cents complained of in this case, which was made June 22, 1903.

By reference to said Exhibit "C," it will be seen that the increases and reductions during the period from January 1, 1891, to June 22, 1903, which includes the increase of 2 cents complained of in this case, were as follows:

INCREASES.

| | |
|---|---|
| Sept. 8, 1899 | 1 cent |
| January 1, 1900 | 1 cent |
| (Made by roads north of Ohio River.) | |
| June 22, 1903 | 2 cents |
| Total increase | 4 cents |

REDUCTIONS.

| | |
|---|---|
| November 28, 1891 | 4 cents |
| May 17, 1894 | 2 cents |
| Total reductions | 6 cents |

In other words, during the period from January 1, 1891, to June 22, 1903, the aggregate of the increases was 2 cents less than the aggregate of the reductions.

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## XXXI.

### The Increase of 2 Cents per Hundred Pounds Made Effective June 22, 1903, was Justified, Because the Present Rates (Including Said Increase) are Less than Rates that Were in Force Prior to the Depression in the Lumber Market.

Appellants insist that even including said advance of 2 cents per hundred pounds made effective June 22, 1903, the present rates are less than rates that were in force prior to the period of depression in the lumber market.

To illustrate: Prior to said depression, the rates on flat cars from stations on the Southern Railway, between Macon and Brunswick to Chicago, were as follows, in cents per hundred pounds, viz.:

From April 11, 1887, to April 1, 1890.....31.5 cent
From April 1, 1890, to April 8, 1890.....28 cents
From April 8, 1890, to May 12, 1891.....27 cents
From May 12, 1891, to November 28, 1891.....28 cents

The rate on flat cars from said stations to Chicago, now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality

an "advance" at all. It is from 1 to 5½ cents less than any rate that was ever in force from November 28, 1891, back to April 11, 1887, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to November 28, 1891.

The testimony further shows that from stations on the Mobile & Montgomery and Pensacola Divisions of the L. & N. R. R. to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From April 21, 1887, to May 28, 1887.....40 cents
From May 28, 1887, to August 5, 1889.....34 cents
From August 5, 1889, to July 16, 1893.....28 cents
From July 16, 1893, to May 10, 1894.....27 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is from 2 to 14 cents less than any rate that was ever in force from May 10, 1894, back to April 11, 1887, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to May 10, 1894.

* * * * * *

The testimony further shows that from stations on the Pensacola & Atlantic Division of the L. & N. R. R., to Chicago, the rates on flat cars were as follows, in cents per one hundred pounds:

From January 1, 1887, to April 21, 1887.....41 cents
From April 21, 1887, to May 28, 1887.....40 cents
From May 28, 1887, to August 5, 1889.....34 cents
From August 5, 1889, to July 16, 1893.....31 cents
From July 16, 1893, to July 27, 1893.....30 cents
From July 27, 1893, to May 10, 1894.....29 cents
From May 10, 1894, to May 20, 1897.....27 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds made effective June 22, 1903, is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is from 1 to 15 cents less than any rate that was ever in force from said stations, from May 20, 1897, back to January 1, 1887, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to May 20, 1897.

The testimony further shows that from stations on the G. S. & F. Ry., between Macon and Valdosta, to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From March 1, 1890, to March 5, 1890.....31.5 cents
From March 5, 1890, to January 15, 1892.....28 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 27 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is from 1 cent to 4½ cents less than any rate that was ever in force from January 1, 1892, back to March 1, 1890, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to March 1, 1890.

* * * * * *

The testimony further shows that from stations on the G. S. & F. Ry., between Pasher, Ga., and White Springs, Fla., to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From March 1, 1890, to March 5, 1890.....32.5 cents
From March 5, 1890, to January 15, 1892.....29 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 28 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

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In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is from 1 cent to 4½ cents less than any rate that was ever in force from said stations from January 15, 1892, to March 1, 1890, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to January 15, 1892.

* * * * * *

The testimony further shows that from Iron City and Donaldsonville, Ga., stations on the A. C. L. R. R. to Chicago, the rates on flat cars were as follows in cents per hundred pounds:

From July 23, 1890, to October 1, 1891.....30 cents
From October 1, 1891, to November 12, 1891.....33 cents
From November 12, 1891, to February 15, 1892...31 cents
From February 15, 1892, to April 29, 1893.....30 cents
From April 29, 1893, to August 11, 1893.....28 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 27 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is from 1 cent to 6 cents less than any rate that was ever in force from said stations, from August 11, 1893, back to July 23, 1890, which is as far back

as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to August 11, 1893.

The testimony further shows that from the stations on the A. C. L. R. R., between Brunswick and Albany, to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From August 1, 1888, to March 18, 1892.....32 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 27 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is 5 cents less than any rate that was ever in force from said stations to Chicago from March 18, 1892, to August 1, 1888, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force prior to March 18, 1892.

* * * * * *

The testimony further shows that from stations on the Central of Georgia Railway, between Macon and Savannah, to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From April 10, 1893, to February 6, 1892.....28 cents

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The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective June 22, 1903, is only 27 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds, is not in reality an "advance" at all. It is 1 cent less than any rate that was ever in force from said stations to Chicago from February 6, 1892, back to April 10, 1890, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force prior to February 6, 1892.

* * * * * *

The testimony further shows that the rates on flat cars from stations on the Southern Railway, between Macon and Brunswick, Ga., to Indianapolis, Ind., were as follows in cents per one hundred pounds:

From April 11, 1887, to April 1, 1890.....28.5 cents
From April 1, 1890, to November 28, 1891.....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 26 cents per hundred pounds,

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 1 to 2½ cents less than any rate that was ever in force from said stations to Indianapolis from November 28, 1891, back to April 11, 1887, which is as far back as the rates on file with the Inter-

state Commerce Commission will show. It therefore is not even a restoration of the rates that were in force prior to November 28, 1891.

* * * * * *

The testimony further shows that from stations on the Mobile and Montgomery and Pensacola Divisions of the L. & N. R. R., to Indianapolis, the rates on flat cars were as follows, in cents, per hundred pounds:

From May 2, 1887, to May 28, 1887.....38 cents
From May 28, 1887, to August 5, 1889.....32 cents
From August 5, 1889, to July 16, 1893.....27 cents
From July 16, 1893, to May 10, 1894.....28 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 25 cents per one hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 2 to 13 cents less than any rate that was ever in force from said stations to Indianapolis from May 10, 1894, back to May 2, 1887, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to May 10, 1894.

* * * * * *

The testimony further shows that from stations on the Pensacola & Atlantic Division of the L. & N. R. R., to Indianapolis, the rates on flat cars were as follows, in cents per one hundred pounds.

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From May 2, 1887, to May 28, 1887.....38 cents
From May 28, 1887, to August 5, 1889.....32 cents
From August 5, 1889, to July 16, 1893.....30 cents
From July 16, 1893, to July 27, 1893.....31 cents
From July 27, 1893, to May 10, 1894.....30 cents
From May 10, 1894, to May 20, 1897.....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 25 cents per one hundred pounds.

See Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 2 to 13 cents less than any rate that was ever in force from said stations to Indianapolis from May 20, 1897, back to May 2, 1887, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to May 20, 1897.

* * * * * *

The testimony further shows that from stations on the G. S. & F. Ry., between Macon and Valdosta to Indianapolis, the rates on flat cars were as follows, in cents per one hundred pounds:

From March 1, 1890, to March 5, 1890.....28.5 cents
From March 5, 1890, to January 15, 1892.....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 1 to 2½ cents less

than any rate that was ever in force from said stations to Indianapolis from January 15, 1892, back to March 1, 1890, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to January 15, 1892.

* * * * * *

The testimony further shows that from stations on the G. S. & F. Ry., between Dasher, Ga., and White Springs, Fla., to Indianapolis, the rates on flat cars were as follows, in cents per one hundred pounds:

From March 1, 1890, to March 5, 1890.....29.5 cents
From March 5, 1890, to January 15, 1892.....28 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 27 cents.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 1 to 2½ cents less than any rate that was ever in force from said stations to Indianapolis from January 15, 1892, to March 1, 1890, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to January 15, 1892.

* * * * * *

The testimony further shows that from Iron City and Donaldsonville, Ga. (stations on the A. C. L. R. R.), to Indianapolis, the rates on flat cars were as follows, in cents per one hundred pounds:

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From July 23, 1890, to January 1, 1891.....28 cents
From January 1, 1891, to October 1, 1891.....27 cents
From October 1, 1891, to November 12, 1891.....30 cents
From November 12, 1891, to February 15, 1892...28 cents
From February 15, 1892, to August 11, 1893.....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 1 to 4 cents less than any rate that was ever in force from said stations to Indianapolis from August 11, 1893, to July 23, 1890, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to August 11, 1893.

* * * * * *

The testimony further shows that from stations on the A. C. L. R. R., between Brunswick and Albany to Indianapolis, the rates on flat cars were as follows, in cents per hundred pounds:

From August 1, 1888, to March 18, 1892.....29 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 26 cents per hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is 3 cents less than any rate that was ever in force from said stations to Indianapolis

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from March 18, 1892, to August 1, 1888, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force prior to March 18, 1892.

* * * * * *

The testimony further shows that from stations on the Central of Georgia Railway, between Macon and Savannah, to Indianapolis, the rates on flat cars were as follows, in cents per hundred pounds:

From January 10, 1888, to April 10, 1890.....29 cents
From April 10, 1890, to February 6, 1892.....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 26 cents per one hundred pounds.

Compton, Trans., Part II, pp. 683, 790.

In other words, the present rate on flat cars is not in reality an "advance" at all. It is from 1 to 3 cents less than any rate that was ever in force from said stations to Indianapolis from February 6, 1892, back to January 10, 1888, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to February 6, 1892.

* * * * * *

The testimony shows that what is true with reference to the increase in the lumber rates made effective June 22, 1903, from the specified stations in Southern territory to Chicago and Indianapolis, respectively, not being even a restoration of rates formerly charged, is equally true, speak-

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ing generally, from all stations in the Southeastern territory to points on and north of the Ohio River.

Mr. Compton testified that the lumber producing territory in the South includes Arkansas, Louisiana, Mississippi Alabama, Georgia and Florida—a territory 700 miles wide; that the territory of destination of said lumber comprises five or six States on and north of the Ohio River; that the present rate adjustment is made with a view to giving each of the lumber producing points in the South a rate no higher, or at least closely approximating, the rate from the lowest producing territory; so as to enable all producing points in the South to compete on substantially the same terms in the territory of destination. He adds: "You may find here and there a change by advance; but on the whole, these (i. e., rates from shipping points in Georgia to points on and north of the Ohio River) are not a restoration of previous rates."

Trans., Part II, p. 683.

Mr. Compton further states "that the average of the present rates is not as much as the average of the former rates;" and in arriving at said average, his compilation goes back to the 1st of January, 1887.

Trans., Part II, p. 683.

We insist that it was error of law for the Commission and the Courts to give to those facts the legal value to which they are entitled.

## XXXII.

### The Increase of 2 Cents Per Hundred Pounds Made Effective June 22, 1903, was Justified; Because the Percentage of Increase has been Greater in the Operating Expenses of the "Intermediate" Roads Which Receive Said Increase than in the Rates on Lumber.

The report and opinion in this case, Trans., Part II, p. 1025, stated that the rates from Georgia shipping points, to points north of the Ohio River, are divided between three classes of roads:

(*a*) The "originating roads," on which the lumber is principally manufactured, and which lie south of Macon, Albany or Montgomery.

(*b*) The "intermediate roads," which receive the lumber from the "originating roads," and carry it to the Ohio River.

(*c*) Th roads beyond (i. e., north of) the river.

Said report and opinion also states on the same page that the "advance of 2 cents complained of in this case goes to the 'intermediate roads' north of Macon, Albany or Montgomery; and none of it to the 'originating roads,' or to roads beyond, or north of the Ohio River."

The "intermediate roads," which carry the lumber from Macon, Albany or Montgomery to the Ohio River are the Southern Railway, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Central of Georgia Railway, and the Seaboard Air Line Railway.

The advance of 2 cents complained of in this case was, as stated in said report and opinion, Trans., Part II, p. 1021, made effective on June 22, 1903; and from that date back to September 8, 1899, said "intermediate roads" charged rates which were only 2 cents per hundred pounds less than those made effective on June 22, 1903. No complaint has ever been made of the rates charged by said "intermediate roads" between September 8, 1899, and June 22, 1903.

Appellants aver that said rates which were charged by said "intermediate roads" between September 8, 1899, and June 22, 1903, were low; that the operating expenses of said "intermediate roads" properly attributable to freight traffic increased between September 8, 1899, and June 22, 1903, by a greater per cent than the rates on lumber increased between the same dates; and they insist that under those circumstances the said so-called advance of 2 cents per hundred pounds made on June 22, 1903, was fully justified.

Smith & Forrest v. L. & N W. Ry. Co. et al. XI Ry. & Canal Traf. Cas., p. 156.

We submit herewith the following table, compiled from the Statistics of Railways in the United States, published by the Interstate Commerce Commission, for the fiscal year ending June 30, 1900 (which includes September 8, 1899); for the fiscal year ending June 30, 1901; and for the fiscal year ending June 30, 1903 (which includes June 22, 1903).

Said table is as follows:

| Railroad | | Gross Earnings from Operations | | Total Operating Expenses | Percentage of Total Operating Expenses to Gross Earnings | | Total Freight Earnings (Including Stockyards, Elevators and Miscellaneous) | Total Operating Expenses Properly Attributable to Total Freight Earnings (Including Stockyards, Elevators and Miscellaneous) | | Total Mileage Operated | Total Operating Expenses per Mile of Road Operated Properly Attributable to Total Freight |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1900 | | | | | | | | | | | |
| Southern Ry | (387) | $31,166,282 | (457) | $20,749,068 | 66.58 | (387) | $21,006,730 | $13,986,280 | (250) | 6,431 | $2,175 |
| L. & N. R. R. | (387) | 28,451,746 | (457) | 19,065,722 | 67.01 | (387) | 21,286,647 | 14,264,182 | (250) | 3,234 | 4,410 |
| N. C. & St. L. Ry. | (363) | 7,109,478 | (444) | 4,687,012 | 65.92 | (363) | 5,202,381 | 3,468,961 | (200) | 1,189 | 2,917 |
| C. of Ga. Ry | (361) | 5,944,796 | (443) | 3,856,281 | 64.87 | (361) | 4,020,459 | 2,601,325 | (194) | 1,575 | 1,651 |
| S. A. L. Ry* | (393) | 10,184,614 | (461) | 7,159,751 | 70.30 | (393) | 7,478,992 | 5,257,731 | (264) | 2,592 | 2,028 |
| 1903 | | | | | | | | | | | |
| Southern Ry | (405) | 42,338,248 | (473) | 29,786,069 | 70.35 | (405) | 28,081,034 | 19,755,407 | (272) | 7,137 | 2,768 |
| L. & N. R. R. | (405) | 35,568,483 | (473) | 24,051,928 | 67.62 | (405) | 26,056,249 | 18,024,955 | (272) | 3,491 | 5,163 |
| N. C. & St. L. Ry. | (379) | 9,564,132 | (461) | 6,995,604 | 73.14 | (379) | 7,251,588 | 5,303,811 | (214) | 1,195 | 4,438 |
| C. of Ga. Ry. | (379) | 8,975,971 | (461) | 6,634,233 | 73.91 | (379) | 6,702,314 | 4,658,040 | (214) | 1,860 | 2,504 |
| S. A. L. Ry. | (405) | 11,954,010 | (473) | 8,238,178 | 68.92 | (405) | 8,832,081 | 6,087,070 | (272) | 2,611 | 2,331 |

Figures prefixed in parenthesis refer to pages of Statistics of Railways in the United States for the years named.

Percentage of increase in 1903 over 1900 in total operating expenses per mile of road operated, properly attributable to total freight—

| | Per Cent | | Per Cent |
|---|---|---|---|
| Southern Ry | 27.2 | C. of Ga. Ry | 51.6 |
| L. & N. R. R. | 17.0 | S. A. L. Ry | *15.0 |
| N. C. & St. L. Ry | 52.1 | | |

* The figures shown for the S. A. L. Ry. are for the fiscal year ending June 30, 1901; figures for the fiscal year ending June 30, 1900, not being obtainable from Statistics of Railways.

It will be seen that the total operating expenses, per mile of road operated, properly attributable to total freight earnings (including stockyards, elevators and miscellaneous) increased between September 8, 1899, and June 22, 1903, as follows: On the Seaboard Air Line Railway, 15 per cent; on the Louisville & Nashville Railroad, 17 per cent; on the Southern Railway, 27.2 per cent; on the Central of Georgia Railway, 51.6 per cent; and on the Nashville, Chattanooga & St. Louis Railway, 52.1 per cent.

Between September 8, 1899, and June 22, 1903, the rates on lumber from stations on the Southern Railway between Macon and Brunswick, Ga., to Cairo, Ill., increased from 14 cents to 16 cents per hundred pounds, which is an increase of only 14.3 per cent.

Cairo is selected as an Ohio River point for the reason that practically all the rates to points north of the Ohio River base on Cairo; and for the further reason that, Cairo taking the lowest rate of all the Ohio River points, the advance of 2 cents per hundred pounds constitutes a greater percentage of the former rate to Cairo than it constitutes of the former rate to any other Ohio River point.

We insist that it was error of law for the Commission, and the Courts, to refuse to give these facts the legal value to which they are entitled.

## XXXIII.

### The Increase in Appellants' Operating Expenses is Not Due Alone to Increased Mileage.

The majority report and opinion (Trans., Part II, p. 1035) said:

"The operating expenses of the defendant roads have increased from year to year. Those increases are due *for the most part* to the constant growth or enlargment of the business of the roads. The growth in business has resulted from *the larger mileage operated*, the development of the country traversed by the roads and from advancement in methods of operating and additions to and improvements in equipment of all kinds. The business of the roads, or the tonnage of traffic transported by them not only in the item of lumber, but also in traffic generally has been most materially augmented."

Said report and opinion commits an error of fact when it states, in effect, that the increase in operating expenses is due for the most part to *the larger mileage operated.* The "Statistics of Railways in the United States" for the years 1901, 1902 and 1903 respectively, published by the Interstate Commerce Commission, show the operating expenses and the mileage of each of appellants for each of said years, and a computation therefrom demonstrates that the percentage of increase of appellants' operating expenses was very much greater than the percentage of increase of appellants' mileage during that period.

It will be seen from said computation that the increase

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in operating expenses in 1902 over 1901 was 9.9 per cent; while the increase in mileage was only 9-10ths of 1 per cent.

It will also be seen that the increase in operating expenses in 1903 over 1902 was 25.9 per cent; while the increase in mileage was only 15.3 per cent.

Said computation is as follows.

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(Figures Prefixed in Brackets Refer to Citations at Foot of Statement.)

Operating Expenses.

| Railroad | 1901 | 1902 | 1903 |
|---|---|---|---|
| Southern Ry .. | (1) $23,275,304 | (8) $25,625,444 | (15) $29,786,069 |
| A. C. L. R. R.. | (2) 4,644,829 | (9) 4,738,987 | (16) 11,889,597 |
| L. & N. R. R,.. | (3) 18,396,919 | (10) 21,018,588 | (17) 24,051,928 |
| N. C. & St L. Ry | (4) 5,110,613 | (11) 5,622,114 | (18) 6,995,604 |
| S. A. L. Ry.... | (5) 7,159,755 | (12) 7,183,817 | (19) 8,238,178 |
| C. of Ga. Ry .. | (6) 4,660,435 | (13) 5,393,014 | (20) 6,634,233 |
| G. S. & F..... | (7) 865,591 | (14) 915,012 | (21) 1,183,075 |
| Total ..... | $64,113,446 | $70,496,976 | $88,775,684 |

Increase in operating expenses, 1902 over 1901, $ 6,383,530 = 9.9 per cent.
Increase in operating expenses, 1903 over 1902, 18,278,708 = 25.9 per cent.

Mileage Operated

| Railroad | 1901 | 1902 | 1903 |
|---|---|---|---|
| Southern Ry .. | (22) 6,728 | (29) 6,765 | (36) 7,136 |
| A. C. L. R. R | (23) 1,801 | (30) 1,805 | (37) 4,138 |
| L. & N. R. R .. | (24) 3,325 | (31) 3,444 | (38) 3,491 |
| N. C. & St L. Ry | (25) 1,195 | (32) 1,195 | (39) 1,195 |
| S. A. L. Ry ... | (26) 2,592 | (33) 2,603 | (40) 2,610 |
| C. of Ga. Ry.... | (27) 1,860 | (34) 1,860 | (41) 1,860 |
| G. S. & F ..... | (28) 285 | (35) 285 | (42) 395 |
| Total ..... | 17,786 | 17,957 | 20,825 |

Increase in mileage, 1902 over 1901, 171 miles = 0.9 per cent.
Increase in mileage, 1903 over 1902, 2,868 miles = 15.9 per cent.

Citations.

| Statistics Rys. 1901 | Statistics Rys 1902 | Statistics Rys. 1903 | Statistics Rys. 1901 | Statistics Rys. 1902 | Statistics Rys. 1903 |
|---|---|---|---|---|---|
| (1) p. 461 | (8) p. 467 | (15) p. 473 | (22) p. 264 | (29) p. 268 | (36) p. 272 |
| (2) p. 445 | (9) p. 453 | (16) p. 473 | (23) p. 200 | (30) p. 198 | (37) p. 272 |
| (3) p. 461 | (10) p. 467 | (17) p. 473 | (24) p. 264 | (31) p. 268 | (38) p. 272 |
| (4) p. 448 | (11) p. 456 | (18) p. 461 | (25) p. 214 | (32) p. 214 | (39) p 214 |
| (5) p. 461 | (12) p. 467 | (19) p. 473 | (26) p. 264 | (33) p 268 | (40) p. 272 |
| (6) p. 447 | (13) p. 455 | (20) p. 461 | (27) p. 208 | (34) p. 206 | (41) p. 214 |
| (7) p. 447 | (14) p. 455 | (21) p. 462 | (28) p. 212 | (35) p. 210 | (42) p. 222 |

## XXXIV.

### The Fact that Appellants' Net Earnings, as Well as Their Gross Earnings, Have Increased is Not Material.

The majority report and opinion (Trans., Part II, p. 1037), publishes what is described as Table "A," giving the "name of road, etc.," "gross earnings from operations," "total operating expenses," "percentage of operating expenses to earnings," "net earnings," "net earnings per mile of road," and "total mileage operated" for the years 1899 and 1903, respectively.

The object of said table was to show that appellants' net earnings, as well as their gross earnings, have increased.

While said table does set forth the "percentage of operating expenses to earnings," it does not set forth the "percentage of net earnings to gross earnings from operations," which is an extremely important factor. Appellants have added to said table a column headed "Percentage of Net Earnings to Gross Earnings from Operations." Said table as amended, is as follows:

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## TABLE A (As Amended).

| NAME OF ROAD, ETC. | | Gross Earnings from Operations | Total Operating Expenses | Percentage of Operating Expenses to Earnings | Net Earnings | Net Earnings Per Mile of Road | Total Mileage Operated | Percentage of Net Earnings to Gross Earnings from Operations |
|---|---|---|---|---|---|---|---|---|
| Southern Railway | 1899 | $25,353,686 | $16,500,526 | 65.09 | $ 8,853,160 | $1,646 | 5,958.68 | 34.9 |
| | 1903 | 42,338,248 | 29,786,069 | 70.35 | 12,552,179 | 1,761 | 7,136.98 | 29.6 |
| Atlantic Coast Line R. R | 1899 | 6,389,612 | 3,570,479 | 55.88 | 2,819,133 | 1,605 | 1,756.75 | 44.2 |
| | 1903 | 19,676,746 | 11,889,597 | 60.42 | 7,787,149 | 1,881 | 4,138.87 | 39.6 |
| Louisville & Nashville R. R | 1899 | 24,277,517 | 16,027,242 | 66.02 | 8,250,275 | 2,621 | 3,147.94 | 33.9 |
| | 1903 | 35,568,483 | 24,051,927 | 67.62 | 11,516,556 | 3,299 | 3,491.30 | 32.4 |
| Nashville, Chattanooga & St. L. Ry | 1899 | 6,579,376 | 4,411,830 | 67.05 | 2,167,546 | 1,823 | 1,188.75 | 32.9 |
| | 1903 | 9,564,132 | 6,995,604 | 73.14 | 2,568,528 | 2,149 | 1,195.29 | 26.8 |
| Seaboard Air Line Ry | 1899 | No report | | | | | | |
| | 1903 | 11,954,010 | 8,238,178 | 68.92 | 3,715,832 | 1,425 | 2,610.97 | 31.09 |
| Central of Georgia Ry | 1899 | 5,638,129 | 3,630,761 | 64.40 | 2,007,368 | 1,317 | 1,532.37 | 35.6 |
| | 1903 | 8,975,971 | 6,634,233 | 73.91 | 2,341,738 | 1,269 | 1,860.22 | 26.09 |
| Georgia Southern & Florida Ry | 1899 | 953,798 | 660,916 | 69.29 | 292,882 | 1,028 | 285.00 | 30.7 |
| | 1903 | 1,635,191 | 1,180,075 | 72.17 | 455,116 | 1,270 | 395.00 | 27.8 |

Said table shows that in the case of such of appellants, as to whom the figures were obtainable for said table, the percentage of "net earnings" to "gross earnings from operations," was materially less in the year 1903 than in 1899.

Upon this point His Honor, Judge Speer, said:

"It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross and net earnings have steadily increased." . . . "It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but, in the nature of things, this is not to be expected of any business."

138 Fed. Rep., pp. 765, 766, Tift v. Southern Ry.

His Honor fails to explain why it is "not to be expected of any business" that the net earnings should increase in proportion to the gross earnings.

It is manifest that a mere increase in the annual gross earnings of a railroad is no indication of its financial prosperity; because if its operating expenses have also increased so that they exceed the gross earnings, the railroad and its equipment have been subjected to a year's wear and tear without the company deriving any profit at all from its operation.

It is also manifest that a mere increase in the annual net earnings of a railroad is no indication of an improvement in its financial condition; because though the annual net earnings may have increased, yet if they have not in-

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creased in the same proportion as the gross earnings have increased, the railroad and its equipment have been subjected to a year's wear and tear in the carriage for the public of a largely increased traffic but at a materially reduced ratio of profit.

To illustrate: Suppose that during the fiscal year 1903 the gross earnings of a certain railroad were $5,000,000, and the net earnings were $1,500,000. In that case the net earnings would amount to 30 per cent of the gross earnings, which is about the average normal relation which the railway net earnings bear to gross earnings in the territory involved in this complaint.

Statistics of Rys. in U. S., 1903, p. 95.
Statistics of Rys. in U. S., 1904, p. 97.

Suppose that during the fiscal year 1904 the gross earnings of said railroad were $6,000,000, and that the net earnings were $1,600,000. Now, if the percentage of net earnings to gross earnings had been the same in 1904 as it was in 1903 (i. e., 30 per cent), the net earnings in 1904 would have been $1,800,000, whereas they were only $1,600,000; and therefore though both the gross and net earnings increased in the year 1904, the company's net earnings in 1904 were $200,000 less than they would have been if the per cent of net to gross earnings had been as great in 1904 as it was in 1903.

Or, to state it differently, it will be seen that while in the year 1904 the gross earnings increased $1,000,000, the net earnings increased only $100,000; and therefore, the percentage which the increase in net earnings bore to the increase in gross earnings was only 10 per cent; whereas

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the average normal per cent of net to gross earnings is, as shown above, 30 per cent.

In order to compare the profitableness of one year's operation with another, the comparison must be made not between the amount of the gross earnings or the amount of the net earnings, but between the per cent which the net earnings bear to the gross earnings. Using that method of comparison, appellants' operations for 1903 were materially less profitable, in proportion to the amount of traffic carried by them, than they were in 1899; and that was one of the reasons why appellants were justified in making said so-called advance.

The Commission, and the courts below, in effect held that, although the profit of a railway upon a single transaction of carriage may have been greatly diminished because of increased operating cost, yet if, by reason of the multitude of transactions incident to increased volume of business, the net earnings of the carrier as a whole continue to increase, rates cannot be so increased as to maintain the former reasonable profit upon the single transaction.

This doctrine, which is an invention of the Commission, has nothing to support it; it constitutes error of law upon the part of the Commission, and the courts below, because it is in conflict with the opinion of this Court in the case of Cotting v. Kansas City Stock Yards, 183 U. S., p. 95, viz.:

"Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual

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dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because, by reason of the multitude, the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered."

Cotting v. K. C. Stock Yards Co., 183 U. S., p. 95.

## XXXV.

### Permanent Improvements and Equipment are Properly Chargeable to Operating Expenses.

The majority report and opinion (Trans., Part II, p. 1049) said:

"It is to be noted that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements, and also for equipment such as locomotives and cars. While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years."

Said report and opinion (Trans., Part II, p. 1050) said:

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"There was a long period of business depression in the South during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper or first-class condition. When that period passed away unusual expenditures were required for new engines, new car equipment, the replacing of worn-out rails and in other ways necessary to put the roads in proper condition and enable them to handle their largely increased business. As these expenditures were included in the operating expenses reported by the roads, the latter became exceptionally large, reaching a percentage of gross earnings which it is not probable will be maintained in the future."

We insist that it was error of law for the Commission, and the courts, to hold that the cost of permanent improvements and equipment is improperly charged to operating expenses. The question was before this Court in 99 U. S., 420, 421, U. P. R. R. Co. v. U. S. In that case the Court said:

"Some charge to construction account every item of expense, and every part and portion of every item which goes to make the road or any of its appurtenances or equipment better than they were before, whilst others charge to ordinary expense account and against earnings whatever is taken for these purposes from the earnings and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness."

Where the cost of permanent improvements and equip-

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ment is charged to operating expenses, as is done by the appellants, it is necessarily deducted from the gross earnings, before the net earnings can be ascertained; and therefore the cost of such permanent improvements and equipment "is not raised upon bonds or issues of stock."

In other words, appellants in charging the cost of permanent improvements and equipment to operating expenses have adopted the very method which this Court says "is deemed the most conservative and beneficial to the company and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness."

It is true that there was a long period of business depression in the South, during which the appellants not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in first-class condition. It is also true that when that period of business depression passed away appellants were compelled to expend unusual amounts for new engines and cars, and for replacing worn-out rails necessary to put the roads in proper condition so as to enable them to handle their largely increased business. But if during said period of business depression appellants were not financially able to expend amounts sufficient to maintain their roads in proper condition, it was their duty, when said period of depression passed away, to spend such amounts in the improvement of their roads and equipment as they should and would have spent during the period of depression, if they had had the necessary funds at their command.

In considering the justness and reasonableness of the so-called advance of 2 cents per hundred pounds, the Court

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should give precisely the same consideration to the fact that large sums of money have been expended by appellants in putting their roads in proper condition since said period of depression, as the Court would have done if said expenditures had been made during said period. The important fact is that during said period of depression, and since, appellants have been compelled to expend, in the aggregate, a very large amount of money to get their roads into proper condition; and the fact that those large sums of money had to be raised, justified the appellants in endeavoring to raise some portion of it by advancing the rates on lumber and such other commodities as it was believed would bear the advances that have been made without entailing any material injury upon the shippers of said commodities.

Said report and opinion (Trans., Part II, pp. 1049, 1050) said:

"The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like expenditures, or expenditures to the same extent, for many years to come, and the extraordinary amount of such expenditures made by the defendants in a few years, preceding and including the year of the advance in the rates, indicates that this will be the case with them." . . .

"As these expenditures were included in the operating expenses reported by the roads, the latter became exceptionally large, reaching a percentage of gross earnings which it is not probable will be maintained in the future."

The deduction which the majority of the Commission intends shall be drawn from the language above quoted is



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disclosed on page 544 of the report and opinion of said majority in the case of the Central Yellow Pine Association v. Illinois Central Railroad Co. et al., in which, after using language almost identical with that above quoted, said report and opinion adds:

"They (i. e., the expenditures for permanent improvements and equipment) should not therefore be taxed as a part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'"

10 I. C. Rep., p. 544, Central Yellow Pine Assn. v. I. C. R. R.

If appellants were right in charging the cost of permanent improvements and equipment to "operating expenses," as said by this Court in 99 U. S., 420, 421, referred to above, appellants could not have "projected said expenditures proportionately over the future," unless they had made false entries in their books, by failing to charge in each year all the operating expenses of that year, and by charging in future years expenditures which would not be actually made in those years. If it be said, however, that said expenditures could be "projected proportionately over the future," by issuing bonds and stocks to represent them, appellants would, in that event, do exactly what this Court, in the case cited, said that a railroad company ought not to do.

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## XXXVI.

### Lumber was Not Selected by Appellants to Meet the Entire Increase in Their Operating Expenses.

The majority report and opinion (Trans., Part II, p. 1051) said:

"The principal ground urged (for making said advance of 2 cents per hundred pounds) is that additional revenue was needed to meet increased expenses, and that, in the language of one of the principal witnesses of defendant, they 'looked around to see where they could best get that additional revenue, and one of the commodities which they thought would *bear* the advance was lumber.'"

"It is said by the witness above referred to that lumber was selected because it was thought lumber would '*bear the advance.*'"

The object of the majority of the Commission, in using the language just quoted, seems to be to create the impression upon the Court that lumber was selected by appellants to bear the entire or almost the entire *increase in appellants' operating expenses*, which are set forth in Table "A," in Trans., Part II, p. 1037.

What the witness said was that lumber was *one* of the commodities which it was thought would bear "an *advance*" *of 2 cents per 100 lbs.*; and not that it could bear the entire increase in appellants' operating expenses.

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"The advance of 2 cents complained of in this case goes to the intermediate roads north of Macon, Albany or Montgomery, and none of it to the originating roads or to roads beyond the river (i. e., the Ohio River)."

Trans., Part II, p. 1025.

The "intermediate roads north of Macon, Albany or Montgomery" are the Southern Railway, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Central of Georgia Railway and the Seaboard Air Line.

By reference to said Table "A," in Section XXXIV, it will be seen that the increase in the operating expenses of said intermediate roads, between 1899 and 1903, were the following amounts, viz.:

| | |
|---|---|
| Southern Railway | $13,285,543 |
| Louisville & Nashville Railroad | 8,024,685 |
| N., C. & St. L. Ry | 2,583,774 |
| Central of Georgia Ry | 3,003,472 |
| Seaboard Air Line Ry. (no report for 1899) | ..... |
| Total | $26,897,474 |

In said report and opinion (Trans., Part II, p. 1035) it is stated that said 2 cents advance in the lumber rate on the 200,000,000 feet of lumber shipped to the West before said advance, would amount to $132,000 per annum.

Said $132,000, which represents the total amount received by said intermediate roads (which received all of said advance), amounts to only 49-100ths of 1 per cent of the increase in the operating expenses of said intermediate roads

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(viz., $26,897,474), and therefore the witness referred to could not have meant that lumber was selected by the intermediate roads to bear the entire increase in their operating expenses. On the contrary, lumber bears a very insignificant portion of said increase.

## XXXVII.

### The Rate on Lumber May be Somewhat Remunerative and Yet be Unreasonably Low.

The majority report and opinion (Trans., Part II, p. 1048) said:

"That if a rate on an article of traffic is already remunerative, the increased prosperity of the business of manufacturing that article is no ground for an advance of the rate."

The argument ignores the difference between a rate that is barely remunerative and one that is reasonably remunerative.

In what are known as the "long-and-short-haul cases," it has repeatedly been argued by the Commission that a rate to a longer distance competitive point must be assumed to be remunerative, or the carriers would not accept it; and that if that rate be remunerative, a higher rate to a shorter distance point must necessarily be unreasonably high. The Commission persistently overlooks the fact that while the rate to the longer distance competitive point may pay something over the cost of movement of the longer distance competitive traffic (and *in that sense* may be somewhat remunerative), it may not pay, and frequently does not pay anything like a *reasonable* remuneration upon that traffic.

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In the case of Smyth et al. v. Ames et al., this Court quoted the following from Justice Brewer:

"It must be remembered that these roads are competing roads; that competition tends to a reduction of rates—sometimes as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

169 U. S., p. 542, Smyth et al. v. Ames et al.

Therefore this Court has never allowed the fact that the longer distance competitive rate pays something more than the cost of movement of the longer distance competitive traffic (and is therefore *to some extent* remunerative) to avail as an argumnt that the higher rate for the shorter distance traffic is unreasonably high.

As we have hereinbefore shown, yellow pine lumber manufactured in South Georgia may be moved by various competing lines to New York and other North Atlantic cities or it may be moved by various competing vessels to Europe; or it may be moved, as in this case, by various competing roads to points on and north of the Ohio River; and when moved to points on and north of the Ohio River, it comes into competition with white pine, spruce and hemlock from Canada and the Northern States; with fir from the Pacific coast; and with yellow pine from Arkansas, Louisiana and Mississippi.

It is manifest, therefore, that rates on yellow pine from South Georgia points to points on and north of the Ohio River must be made in strong competition with other carriers and with other woods. In other words, there is competition of product against product, and competition of carrier against carrier.

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In the language of this Court, such competition not only tends to a reduction of rates, but sometimes, as the history of the country has shown, to a reduction of rates *below that which affords any remuneration to those who own the property.*

163 U. S., p. 542, Smyth et al. v. Ames et al.

Appellants in their answer to the original bill admit "that the existing (through) rates on lumber yield some profit to the carrier;" but they do not admit that said rates yield a reasonable profit even to the through lines; and as to the intermediate roads, which carry the lumber from Macon, Albany and Montgomery, to points on the Ohio River (and they are the only roads whose proportions have been reduced by the Commission), appellants do not admit that those rates are profitable at all.

## XXXVIII.

### Neither the Commission nor the Courts had Jurisdiction to Determine the Reasonableness of the Proportions of a Through Rate.

The majority report and opinion (Trans., Part II, p. 1022) finds that the through rates on lumber from points in Georgia to points north of the Ohio River are made up of the full local rates of the roads north of said river *as the proportions* of those roads; and that whatever is left of said through rates is taken *as the proportion* of the roads south of said river.

On page 1025 of the Transcript, Part II, said report and opinion finds that there are divisions (i. e., *proportions*) of

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the rates south of the Ohio between what are termed the originating roads on which the lumber is principally manufactured, and the roads intermediate between those originating roads and the Ohio River crossings.

Said report and opinion, on page 1054 of the Transcript, Part II, says:

"If the allowances (i. e., *proportions*) to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low *proportions* to the other (i. e., the intermediate) roads, this cannot be remedied by an advance in the total through rates charged the public."

We submit that if the *proportions* are not in issue, the majority of the Commission, and the courts, erred as matter of law, in assuming jurisdiction to determine either that the *proportions* of the originating roads are unreasonably large, or that the *proportions* of the intermediate roads are unreasonably low.

In its Eleventh Annual Report, the Commission said:

"We might order a reduction of the whole rate, but we could not determine how that reduction should be shared by the different carriers. If the carriers refuse to agree about that, it is difficult to see how the order could be enforced. Clearly to make and enforce such an order we must have power to determine the divisions (i. e., *proportions*) of this through rate between the different roads making up the joint line."

11 Ann. Rep., I. C. C., 1897, p. 27.

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In the case at bar, the majority of the Commission has treated the advance of 2 cents as an advance in the total rate from shipping points in Georgia to the Ohio River crossings; and has, in effect, ordered a reduction of 2 cents per one hundred pounds in said through rate; and yet, it has not attempted in this case to direct how that reduction of 2 cents per hundred pounds shall be borne between the "intermediate" roads and the "originating" roads.

If the "originating roads" be asked to bear said reduction out of their proportions, which the majority of the Commission intimates are unreasonably large, they can withdraw from the through rates to the Ohio River, and send their lumber to the coast, and thence by rail or water, to the Northeastern market.

If the intermediate roads refuse to bear said reduction of 2 cents per hundred pounds out of their proportions of the through rate, which the majority of the Commission intimates are already unreasonably low, and refuse to continue to transport the traffic from Macon, Albany and Montgomery to the Ohio River, except at their local rates, the Commission concedes, in the extract above quoted from its Eleventh Annual Report, that it has no power to coerce either the "originating" roads, or the "intermediate" roads, to carry the traffic at the reduced rates ordered by the majority report and opinion in this case.

It was not until the Act was amended, June 29, 1906, that the Commission was given the power by the 15th section to prescribe the just and reasonable *proportion* of joint rates to be received by each carrier party thereto."

34 Stat., p. 584.

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## XXXIX.

### The Majority of the Commission Erroneously Suggests the Reduction of the Proportions of the Intermediate Roads.

The majority of the Commission (Trans., Part II, p. 1025) find that the proportions allowed the originating roads are large in comparison with the lengths of the hauls made by them, and in comparison with the balances of the rates left for the intermediate roads. For example, the Southern Railway allows the originating roads south of Macon from 5½ to 7½ cents out of the rate to the Ohio River. This leaves as the proportion of the Southern out of the 16 cent rate from Group 2 to Cairo from 8½ to 10½ cents, which yields a comparatively small rate per ton per mile, viz: 3 to 5 mills.

Said majority further find (Trans., Part II, p. 1025) that the so-called advance of 2 cents complained of in this case goes to the intermediate roads north of Macon, Albany or Montgomery, and none of it to the originating roads; or to roads beyond the Ohio River.

It will be seen that said majority do not suggest any reduction in the proportions charged by the roads north of the Ohio River; notwithstanding said proportions are the full local rates of those roads; and materially higher per ton per mile than the proportions of the "intermediate roads."

It will also be seen that said majority do not order any reduction in the proportions charged by the originating

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roads, although they admit that such proportions are large in comparison with the balance of the proportions left for the intermediate roads. It will also be seen that notwithstanding said majority admit that the so-called advance of 2 cents complained of in this case goes to the intermediate roads north of Macon, Albany or Montgomery, they adjudge said so-called advance to be unreasonable and unjust, although the proportions of those roads confessedly yield "a comparatively small rate per ton per mile."

In effect, said majority order no reduction from the proportions of any of the roads which now receive the highest rates per ton per mile; and adjudge to be unlawful and unreasonable an increase made by the intermediate roads which now receive the lowest proportions per ton per mile.

## XL.

### The Proportions of the Originating Roads are Not Voluntarily Allowed to Them by the Intermediate Roads.

The majority report and opinion (Trans., Part II, p. 1053) said:

"The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of the through rate. This is due to the large *allowances* out of the rates made to the originating roads."

Said report and opinion (Trans., Part II, p. 1025) said:

"For example, the Southern Railway *allows* the lines south of Macon from 5½ to 7½ cents out of the rate to the

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Ohio. This leaves as the proportion of the Southern out of the 16 cent rate from Group 2 to Cairo from 8½ to 10½, which yields a comparatively small rate per ton per mile."

The language above quoted from said report and opinion was evidently intended to convey to the Court the impression that the allowances made to the originating lines out of the through rates were voluntarily made by the intermediate lines between Macon, Albany and Montgomery on the south, and the Ohio River on the north. The testimony shows, however, that said allowances were *not* voluntary; but, on the contrary, were demanded by the originating lines; and that said intermediate lines had either to grant said allowances, or let the lumber be carried by rival lines. The testimony shows that the originating lines in Georgia can carry the lumber to the coast, and realize as high, if not a higher rate per ton per mile than they now receive; and that the lumber can move from the coast either by rail or water to the Eastern markets. And even as to the lumber moving to the West, the testimony shows that there is competition between the various connections of the originating roads for the traffic; and that if either one of said intermediate roads refuses to allow the originating lines the proportions demanded by them, said originating lines can give the traffic to some other of said intermediate roads to be carried from Macon, Albany or Montgomery to the Ohio River.

Culp, Trans., Part II, p. 478.
Winburn, Trans., Part II, pp. 826, 827.
Capps, Trans., Part II, pp. 854, 855.
Menzies, Trans., Part II, pp. 891, 892.
Cutler, Trans., Part II, pp. 880, 881.
Green, Trans., Part II, p. 542.

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Said report and opinion does not pretend that said intermediate roads, or even the Commission itself, could have compelled said originating lines to accept any less proportions out of the through rates than they now demand and receive.

## XLI.

### The Articles of the Southeastern Freight Association Do Not Violate the Anti-Trust Act.

Said articles were adopted after this Court had decided the cases of U. S. v. Trans-Missouri Freight Association (166 U. S., p. 290) and U. S. v. Joint Traffic Association (171 U. S., p. 505).

Said articles were carefully drawn for the purpose of eliminating those features of freight association agreements which this Court held to be unlawful in the agreements of the Trans-Missouri Association and the Joint Traffic Association.

Those features which this Court had decided to be unlawful in the association agreements involved in those cases, were omitted from the articles of the Southeastern Freight Association; and they were omitted for the very reason that this Court had decided them to be unlawful.

The Court did not decide in either of the said cases that *all* freight association agreements are unlawful.

On the contrary, the legality of each agreement must be determined by its own meaning and effect. To use the ex-

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act language of the Court, "the question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act?"

166 U. S., p. 341, U. S. v. Freight Association.

The Court held that the Trans-Missouri Freight Association agreement did restrain trade or commerce so as to be a violation of the act; because, in the language of the Court, "the agreement on its face recites that it is entered into for the 'purpose of mutual protection by *establishing and maintaining* reasonable rates, rules and regulations on all freight traffic, both through and local.' To that end the association is formed and *a body created which is to adopt rates*, which, when agreed to, *are to be the governing rates for all the companies*, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force, and assuming it to be lived up to, there can be no doubt that its *direct, immediate and necessary* effect is to put a restraint upon trade or commerce, as described in the act."

166 U. S., p. 341, U. S. v. Freight Association.

The articles of the Southeastern Freight Association will be found in the Transcript, Part I, pp. 69-73; and by reference to them it will be seen that said association was *not* formed for the purpose of "*establishing*" or "*adopting*" rates. On the contrary, said articles expressly provide that nothing therein contained shall be so construed as to confer upon a majority or any number of members, or upon any committee, or any officer of said association the power or authority to make rates or tariffs upon the line of any other

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member; it being distinctly understood that such member reserves to itself the exclusive power to make rates and tariffs on its own line.

It will also be seen that said Southeastern Freight Association was *not formed for the purpose of "maintaining"* rates. On the contrary, each member distinctly reserves to itself, at all times, the right to take separate and independent action on each and every subject; and therefore it may change its rates at any time, without being subject to penalty, or even to censure.

This Court held that the Joint Traffic Association agreement restrained trade or commerce so as to be a violation of the act; because the expressed purpose of the agreement in that case was, in the language of the Court, "to *establish and maintain* reasonable and just rates, fares, rules and regulations on State and interstate traffic.

171 U. S., p. 562, U. S. v. Joint Traffic Association.

"*The companies are bound to charge the rates fixed upon originally* in the agreement, or subsequently recommended by the Board of Managers, and *the failure to observe their recommendations is deemed a violation of the agreement.*"

171 U. S., p. 563, U. S. v. Joint Traffic Association.

"By this agreement *the Board of Managers* is in substance, and as a result thereof, *placed in control of the business and rates of transportation*, and its duty is to see to it *that each company charges the rates agreed upon*, and receives its equitable proportion of the traffic."

171 U. S., p. 565, U. S. v. Joint Traffic Association.

By reference to the articles of the Southeastern Freight

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Association (Trans., Part I, pp. 69-73) it will be seen that said association has absolutely no power to either "*establish*" or "*maintain*" rates; because it is expressly provided that no majority, nor any number of members, nor any committee, nor any officer of said association shall have the power to make rates upon the line of any other member; and said member reserves to itself the exclusive power to make its own rates.

It will also be seen that the members of said Southeastern Freight Association do not agree to charge any designated rates, for any period whatever; because each member reserves to itself the exclusive right to make its own rates, and to change them at will; subject only to the notice required by law.

It will also be seen that in the Southeastern Freight Association there is no board of managers, committee or officer placed in control of the business, or rates of any member, or authorized to see to it that each member charges any designated rates. On the contrary, each member has exclusive control of its own business and rates, and may change them whenever it sees proper to do so.

The Southeastern Freight Association understands perfectly that since the decisions of this Court in the Trans-Missouri and Joint Traffic cases, no freight association can be lawfully vested with power to make or maintain rates, or to pool freights or earnings.

Said association has therefore confined its objects and purposes to furnishing a place and method whereby *any* member desiring to obtain the views of other members in regard to any rate, or regulation, may have the subject dis-

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cussed and considered; it being well understood that such discussion and consideration are merely advisory, and that each member reserves the right to form its own opinion, and determine its own action, upon every matter connected with its own road, and to change its action at any moment; whether such matter has or has not been submitted to the association for discussion.

## XLII.

### There was No Agreement Between Competing Lines to Make the So-Called Advance of Two Cents per Hundred Pounds on Lumber.

The majority report and opinion (Trans., Part II, p. 1021) said:

"It (i. e., said advance of 2 cents) was intended to be simultaneous all along the line, and was made, in fact, though not expressly by *agreement* between the roads including the defendants serving the different lumber producing districts. . . . There was a concurrence or *agreement* between the roads before the advance was finally determined upon and made effective."

The testimony is unanimous that there never was any agreement or understanding, either general or special, express or implied, written or oral, in regard to said 2 cents advance.

Powell, Trans., Part II, pp. 910, 911, 912, 913.
Green, Trans., Part II, p. 531.
Compton, Trans., Part II, pp. 639, 691.
Winburn, Trans., Part II, pp. 802, 803.
Capps, Trans., Part II, pp. 860, 861.
Cutler, Trans., Part II, p. 885, 886, 887.
Menzies, Trans., Part II, pp. 892, 895, 896.
Culp, Trans., Part II, pp. 459, 460, 461, 462.

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## XLIII.

### There was no Concert of Action or Previous Understanding Between Competing Lines in Regard to Said So-Called Advance.

The majority report and opinion (Trans., Part II, p. 1045) said:

"The proof shows conclusively that the advance was the outcome of concert of action and a previous *understanding* between the companies."

There was no testimony to support that finding, except the fact that appellants respectively published their individual and separate tariffs, announcing that said advances would be made at or about the same time.

The words, "concert of action," and "previous understanding," were evidently used to import an "agreement," "contract," "combination" or "conspiracy;" and, taken in that sense, we repeat that there was no evidence to support the finding.

## XLIV.

### But Even if there had been "Concert of Action" or "Previous Understanding," it would Not have Rendered Appellants' Action Unlawful.

The majority report and opinion (Trans., Part II, p. 1045) said:

"The proof shows conclusively that the advance was the outcome of concert of action and of previous understanding between the companies."

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The testimony shows that there was no concert of action and no previous understanding between appellants.

There was consideration and interchange of views between the representatives of appellants and other competing carriers, which resulted in each of appellants becoming convinced that the proposed increase in rates was just and proper. Each of appellants believed, from what its representative had heard and seen during the discussions, correspondence and interchanges of views which had occurred between them, that the other appellants and other companies would put said increase into effect on a certain date; but there was no concert of action nor understanding, in the sense of an agreement, that any one of appellants would put said increase into effect.

But if there had been an "understanding," or "concert of action," even in the sense of an agreement, it would not have rendered appellants' action illegal; because the increase would have been put into effect by each of appellants separately and independently; and with the express reservation to each of appellants of the right to revoke the increase at any moment. Such "concert of action" or "understanding," even if it had been in the sense of an agreement, would have been totally different from the concert or understanding which existed between the members of the Trans-Missouri Association and of the Joint Traffic Association, because each of those associations was formed by a contract, under *which the companies selected a central authority to fix and maintain rates, and no company could change the rates* fixed by the representative managers of said association without subjecting itself to a penalty.

See Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

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## XLV.

### It is Not Unlawful for Competing Carriers to Confer Together on Matters of Common Interest.

The majority report and opinion (Trans., Part II, p. 1045) said:

"Through their authorized official representatives, they (the appellants) conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts, the advance should be from all those districts or none; and finally they all promulgated the advance to take effect at exactly the same date and for exactly the same amount."

The finding that through their authorized official representatives the railways conferred with each other repeatedly as to the making of the increase is true. But appellants insist that there is neither at common law, nor under the statutes of the United States, anything illegal in the representatives of competing carriers conferring with each other, however often, as to making an increase or reduction in rates.

The finding that the railways recognized the fact that because of competition in common markets, between the lumber producing districts served by them (i. e., the Arkansas district, the Louisiana and Mississippi district, and the Georgia district), the increase, if made, should be made at or about the same time, from all of those competing districts, on lumber, is true.

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It was necessary for each of the lines operating in either of said districts to ascertain whether every other line, in that district, would increase the rates; and equally necessary to ascertain whether each of the lines operating in the other competing districts would also increase its rates. That fact could not be ascertained except by correspondence or conference; and there is nothing in the law which prohibits such correspondence or conference.

On December 28, 1899, the Interstate Commerce Commision submitted to the Attorney General of the United States certain proposed advances in the official classification and requested his opinion as to whether the evidence taken by the Commission, and reported to the Attorney General, showed a violation of the act of Congress, commonly known as the Sherman Anti-Trust Law. The Attorney General, among other things, said:

"There is an Official Classification Committee, composed of some fourteen railroad officers from different sections. This committee meets on the call of its chairman or upon the request of three members. At its meetings, *suggested changes are considered.* Such changes as the committee with substantial unanimity recommend are noted by the chairman and incorporated into a new official classification, which is then submitted to each company for its individual action. Some sixty railroad companies thus independently pass upon the classification. They signify their adoption to the chairman, who after the official classification has been thus adopted, files it with the Interstate Commerce Commission in compliance with the law."

13 Ann. Rep., I. C. C., p. 17.

The second section of Article II of the Southeastern Freight Association provides that any member of said association "proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration and interchange of views before said change shall take effect; but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not."

Trans., Part I, p. 70.

Article VII of said association provides that "nothing herein contained shall be so construed as to confer upon a majority, or any number of members of this association, the power or authority to make rates or tariffs upon the line of any other member of this association, or to make joint rates or tariffs for any other member." . . .

"It being distinctly understood that each member of this association expressly reserves to itself the exclusive power to make rates and tariffs on its own line, and to itself and its connections the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members."

Trans., Part I, p. 72.

Any member of said association may suggest any change in rates that it sees proper to suggest. The change is then considered by the different members of the association, and at that point the function of the association absolutely ends. There is no vote taken by the members of the association, and every member is left at perfect liberty to adopt or

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reject the proposed change as it may deem best. If the proposed change be adopted by each member of the association except one, that one is at perfect liberty to decline to follow the suggestion.

The Attorney General, in the case above referred to, further said:

"To authorize the Attorney General to direct an injunction proceeding under this law, it must be shown that there is a 'contract, combination, . . . or conspiracy in restraint of trade or commerce among the several States.' In the first place *there is no contract, combination or conspiracy shown. There is consultation by representative railroad men in committee respecting suggested changes in classification. There is subsequent independent action by railroad companies in the adoption of the new classification recommended by the committee. The testimony taken does not show that any railroad company acted under compulsion of a combination* in adopting the official classification. It must be conceded that a common classification by railroad companies operating in the same territory is a desirable thing. *Will it be insisted that a railroad company cannot consult respecting freight classification? Or that, because one railroad company adopts a certain classification, another cannot? The Anti-Trust Law says there must be a contract, combination or conspiracy.* This must be shown. *And it must be shown to restrain individual action.* This is not shown in the testimony submitted."

13 Ann. Rep. I. C. C., p. 18.

There is consultation by representative railroad men in meetings of the Southeastern Freight Association respecting

suggested changes in rates or regulations, but after those consultations have been had, the subsequent action by each railroad company as to whether it will adopt the suggested change in rates or regulations is absolutely separate and independent. The testimony taken in this case not only does not show that any railroad company acts under compulsion of a contract, combination or conspiracy, in adopting the course of action which its representative deems wise, but Article VII of the Southeastern Freight Association expressly prohibits any member, or committee or officer thereof from making rates upon the line of any other member of the association, and expressly reserves to each member the exclusive power to make rates and tariffs on its own line, and to itself and its connections, the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members.

Trans., Part I, p. 72.

The Attorney General, in the case above referred to, further said:

"If a railroad company maintains the existing rates, the change of an article from a lower to a higher class will increase the rate, but, from aught that appears in this testimony, *every railroad company using the classification is at liberty at any time to change the existing rates upon giving the notice required by the Interstate Commerce Act.* Moreover, each railroad company is free to take any article out of the existing classification by making a commodity rate. In other words, *no suppression of competition, no arbitrary fixing of rates, no restraint of interstate commerce is shown.*"

13 Ann. Rep. I. C. C., p. 18.

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Section 2 of Article II of the Southeastern Freight Association is as follows:

"Any member of this association proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration and interchange of views before such change shall take effect; *but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not.*"

Trans., Part I, p. 70.

Article VII of said association expressly provides "that each member of this association expressly reserves to itself *the exclusive power to make rates and tariffs on its own line,* and to itself and its connections the exclusive power to make joint rates and tariffs, *free from the dictation or control of any other member or members.*"

Trans., Part I, p. 72.

Every member of the association is, in the language of the Attorney General, "at liberty at any time to change the existing rates upon giving the notice required by the Interstate Commerce Act. . . . "In other words, no suppression of competition, no arbitrary fixing of rates, no restraint of interstate commerce is shown."

The Attorney General, in the case above referred to, further said:

"The Trans-Missouri and Joint Traffic Association cases afford no precedent for the action requested in this case.

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Each of those associations was formed by a *contract under which the companies selected a central authority to fix and maintain rates.* There was an absolute suppression of competition. The power of independent action was destroyed. No company could change a rate fixed by the managers of the association without subjecting itself to a penalty."

13 Ann. Rep. I. C. C., p. 19.

In the articles of the Southeastern Freight Association the companies did *not* select a central authority, or any other authority *to fix and maintain rates.* On the contrary, Article VII expressly provides that "nothing herein contained shall be so construed as to confer upon a majority, or any number of members of this association, the power or authority to make rates or tariffs upon the line of any other member of this association, or to make joint rates or tariffs for any other member. Nothing herein contained shall be so construed as to confer upon the Executive Board, or the Conference Committee, or the chairman of the association, or the chairman of the Executive Board, or upon any other committee or officer of this association, the power or authority to make rates or tariffs upon the line of any member of this association, or to make joint rates or tariffs for any member of this association."

Trans., Part I, p. 72.

In the articles of the Southeastern Freight Association there is absolutely no suppression of competition. Article II, Section 2, and Article VII of said association expressly reserve to each member of the association the power of independent action, and the power to change any rate without subjecting itself to a penalty, or even to the censure of other members of the association, or of any one else.

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In the Trans-Missouri and Joint Traffic Association cases all that was held by this Court was *that no power to make and maintain rates could be conferred upon traffic associations;* and therefore the articles of the Southeastern Freight Association expressly declared that no majority or any other number of members of said association nor any board, committee or officer of said association should have the power or authority to *make or maintain rates or tariffs* upon the line of any member of the association.

Trans., Part I, p. 72.

It was decided by this Court in the Trans-Missouri and Joint Traffic Association cases that as those associations were formed by a contract under which the companies selected a central authority to fix *and maintain* rates, there was an absolute suppression of competition; and that the power of independent action was destroyed, inasmuch as no company could change a rate fixed by the managers of the association without subjecting itself to a penalty; it was therefore expressly provided in the articles of the Southeastern Freight Association that no officer, board or committee, or the chairman of the association, or the chairman of any board or committee, or any number of members of the association (not even a majority) should have the power, or authority to make rates or tariffs upon the line of any member of the association. In order to prevent the "power of independent action" from being destroyed, it was distinctly specified that each member of the association "expressly reserves to itself the exclusive power to make rates and tariffs on its own line, and to itself and its connections, the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members."

Trans., Part I, p. 72.

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## XLVI.

### No Contract Violates the Anti-Trust Act Unless Its Direct and Immediate Effect is a Restraint Upon Interstate Commerce.

This Court did not decide in the Trans-Missouri and Joint Traffic Association cases that the Anti-Trust Act forbids *all* agreements that may be made between competing carriers. This Court only decided that agreements which give to traffic associations, or to their members or officers, *power to make and maintain rates* are unlawful; and the only reason why the Court decided that those agreements are unlawful is because their *direct, immediate and necessary effect* is to put a restraint upon trade or commerce, as described in the act.

166 U. S., pp. 341, 342, U. S. v. Freight Assn.

In the case of U. S. v. Joint Traffic Association, this Court said:

"In Hopkins v. United States, decided at this term, *post*, 578, we say that *the statute applies only to those contracts whose direct and immediate effect* is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce *must not be indirect or incidental only.* An agreement entered into for the purpose of promoting the legitimate business of an individual or a corporation, with no purpose to thereby affect or restrain interstate commerce,

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and which does not directly restrain such commerce, is not, as we think, covered by the act, *although the agreement may indirectly and remotely affect that commerce.* We also repeat what is said in the case above cited, that '*the act of Congress must have a reasonable construction*, or else there would scarcely be an agreement or contract among business men that could not be said to have, *indirectly or remotely*, some bearing upon interstate commerce and possibly to restrain it.'"

171 U. S., p. 568, U. S. v. Joint Traffic Assn.
171 U. S., p. 578, Hopkins v. U. S.

Under the decisions of this Court in the Trans-Missouri and Joint Traffic Association cases, railroads like other corporations and private individuals may make any agreement with reference to traffic in which they have a common interest, provided its *direct*, *immediate* and *necessary* effect is not a restraint upon interstate commerce; and it is not sufficient to invalidate traffic agreements to show that they have "*indirectly* or *remotely* some bearing upon interstate commerce, and possibly to restrain it."

171 U. S., p. 568, U. S. v. Joint Traffic Assn.

To illustrate: Article II, Section 1, of the Articles of Association of the Southeastern Freight Association prescribes how the Conference Committee shall be constituted. And Section 2 of said article provides that: "Any member of this association proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration, and interchange of views, before such change shall take effect; but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on each

and every subject, whether suggested to said Conference Committee or not."

Trans., Part I, p. 70.

It may be conceded that the section last quoted "*indirectly*," "*incidentally*," or "*remotely*," affects interstate commerce, because the "consideration" and "interchange of views" provided for may result in a change of rates, that otherwise would not occur. *But it does not have a "direct and immediate effect"* upon interstate commerce, because, as a matter of fact, no change of rates may result from such consideration and interchange of views; and if it should, *each member reserves to itself at all times the right to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not.* Therefore, if any change in rates should be made as the result of said consideration and interchange of views, such change may immediately thereafter be revoked by any member, and by its separate and independent action. It is in that very respect that the Southeastern Freight Association differs from the Trans-Missouri and Joint Traffic Associations. As said by the Attorney General, those (the Trans-Missouri and Joint Traffic) associations were formed by contracts under which the companies *selected a central authority to fix and maintain rates. No company could change a rate fixed by the managers of the association* without subjecting itself to a penalty; and therefore there was an absolute suppression of competition, and the power of independent action was destroyed.

13 Ann Rep. I. C. C., p. 19.

But in the Southeastern Freight Association, *no power was conferred upon any board, committee, officer or member*

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*of the association to make rates upon the line of any* other member, and each and *every member was expressly authorized to change its own rates*, at any time, free from the dictation of any other line.

This Court decided that the Trans-Missouri and Joint Traffic Associations were unlawful, because their *direct, immediate* and *necessary* effect was to put a restraint upon interstate commerce, *because they conferred upon their officers power to make and maintain rates, and reserved no right to their individual members to change such rates.*

166 U. S., 341, 342, U. S. v. Frt. Assn.

## XLVII.

### Said Increase of Two Cents per Hundred Pounds in the Rates was not Made Through the Agency of the Southeastern Freight Association.

The majority report and opinion in this case (Trans., Part II, p. 1045) said:

It is claimed by the railway companies that in advancing the rate they acted independently, each for itself, and not through the agency of the Southeastern Freight Association."

Appellants admit that said finding is true.

The matter of advancing the lumber rates came before said association twice, on which occasions it was discussed, but no further action was taken in the association.

On the 11th day of February, 1903, there was a meeting

of the Southeastern Freight Association, held in the city of Atlanta, and the complete minutes of that meeting so far as they relate to said matter, were as follows:

"Subject 1924. File 34974. Rates on pine lumber, carloads to the West:

"This subject was listed by unanimous consent, upon the request of various members, and referred to the following sub-committee: Messrs. C. R. Capps, Chairman; H. M. Emerson, W. E. Estes, J. M. Cutler, T. C. Powell, E. K. Bryan, Jr., M. V. Mahoney, H. F. Smith and A. G. Jackson."

"The following recommendation was submitted:

"Recommended, That, effective March 1st, 1903, the rates on lumber from southeastern territory to Ohio River crossings, be increased 2 cents per 100 lbs., and rates beyond made on lowest combination, with the understanding that the question of divisions will be handled on its merits."

"The following recommendation was also submitted:

"Recommended, That, contingent upon a like advance from points in Arkansas, Texas, Louisiana, Mississippi and Alabama, an advance of 2 cents per 100 pounds be made in the rates on pine lumber from points in Georgia, Florida and Alabama, to Memphis, Tenn., Nashville and West Nashville, Tenn., and to interior junction points in Kentucky and Tennessee, and to intermediate crossings between Memphis and Cairo."

"The recommendations *were discussed and no further action taken thereupon.*"

Trans., Part I, pp. 13, 14.

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It will be seen that nothing was done at said meeting except *to discuss* the recommendations referred to in the above extract.

The only other occasion when the matter of advancing the lumber rates came before said association was on March 10-12, 1903, at a joint convention of representatives of the Southeastern Mississippi Valley Association and the Southeastern Freight Association, held at Atlanta; and the complete minutes of that meeting, so far as they relate to said matter, were as follows:

"Subject 393. Files 4934 (S. E. M. V.), 34974 (S. E. F. A.).

"RATES ON YELLOW PINE LUMBER FROM THE SOUTH TO WESTERN POINTS.

"This subject was listed by unanimous consent.

"The following recommendation was submitted:

"1st. Recommended, That, effective April 15, 1903, an advance of 2 cents per hundred pounds be made in the rates on yellow pine lumber, carloads, from producing points in Mississippi, Louisiana and the Southeast to St. Louis, East St. Louis and all Mississippi River crossings between Memphis and St. Louis and all Ohio River crossings, Cairo to Cincinnati, both inclusive."

"Recommended further, That the rates on pine lumber to all points north of the Ohio River and east of the Mississippi River and west of the western termini of the trunk lines shall be made on lowest combination."



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"Recommended further, That a corresponding advance of 2 cents per hundred pounds be made to Nashville, Tenn., Memphis, Tenn., and to West Tennessee and Kentucky junction points, provided not in excess of the continuous local scale of any line."

"Recommended further, That an advance of 2 cents per hundred pounds be made to Chattanooga, provided it does not exceed the continuous local scale of any line."

"It is stated, as a matter of information, that it is understood a corresponding advance of 2 cents per hundred pounds from points in Louisiana and Arkansas is to be made, effective on April 1st.

"It is also stated, for record, that, at a conference of the Southwestern Traffic Bureau, held in St. Louis, Mo., January 30, the following was unanimously adopted:

"Recommended, That, contingent upon like advances from Arkansas and Louisiana, the same advances in lumber rates be made from Texas points to Mississippi River crossings, Cairo and north and lower Ohio River crossings, that are made from the yellow pine districts in the Southeast. it being understod, however, that the right is reserved to make rates from Texas points no higher than rates from the Southeast."

"2d. Recommended, That an advance of 2 cents per hundred pounds, effective April 15, 1903, be made in the rates on yellow pine lumber, carloads, from points in Mississippi, Alabama and the Southeast, to the Buffalo-Pittsburg zone, and that such advances as are necessary be made in the basing rates, in order to accomplish this result."

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"The recommendations *were discussed, and no further action taken thereupon.*"

Trans., pp. 14, 15, 16.

It will be seen that nothing was done at the second meeting except to *discuss* the recommendations referred to in the above extract.

It will be seen that there was not even a vote taken on any of said recommendations at either of said meetings; much less was there an agreement or understanding entered into at either of said meetings, between any of the members, that any one of said recommendations should be carried out.

## XLVIII.

### Appellants did Not Promulgate the Increase of Rates on the Same Day.

The majority report and opinion in this case (Trans., Part II, p. 1045) said: "They (appellants) all promulgated the advance to take effect at exactly the same date and for exactly the same amount."

The testimony shows that each of appellants did promulgate that the advance would take effect at exactly the same date, but it also shows that no two of the appellants made their promulgation of the advance on the same date.

Section 8 of the "Method of Procedure for the Consideration of Subjects by the Conference Committee," filed as Exhibit No. 2 to the answer of S. F. Parrott, Chairman, to

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the amended bill filed April 21, 1903 (Trans., Part II, pp. 73, 74), shows that the method by which members of the Southeastern Freight Association respectively promulgated their increases or reductions in rates, was by filing respectively, with said chairman, "written statements or declarations," notifying the chairman of the changes in tariffs or rates established by them respectively.

Article VI of the Southeastern Freight Association makes it the duty of the chairman "to receive from each member copies of tariffs or rates established by said member, (and) to compile, print and distribute such tariffs or rates in accordance with the Interstate Commerce Act and other laws."

Trans., Part I, p. 71.

The testimony shows that the "written statements or declarations" filed by the several appellants in this case with Chairman Parrott notifying him of the increase in rates complained of in this case, were not filed jointly, but were filed separately, and independently, by each of the appellants; that they were filed on different dates, and that no two of appellants filed their "written statements or declarations" with the chairman on the same date.

The written statement or declaration of the A. & W. P. R. R. and Western Railway of Alabama (which are connecting roads), promulgating said increase of 2 cents per hundred pounds, was dated March 19, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the A. C. L. R. R., promulgating said increase, was dated March 5, 1903.

Trans., Part I, p. 9.

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The written statement or declaration of the Central of Georgia Railway, promulgating said increase, was dated March 30, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Georgia Railroad, promulgating said increase, was dated March 24, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Georgia, Florida & Alabama Railway, promulgating said increase, was dated April 9, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Georgia Southern & Florida Railway, promulgating said increase, was dated April 3, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Macon & Birmingham Railway Company, promulgating said increase, was dated April 6, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Nashville, Chattanooga & St. Louis Railway, promulgating said increase, was dated March 7, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Seaboard Air Line Railway, promulgating said increase, was dated March 9, 1903.

Trans., Part I, p. 9.

The written statement or declaration of the Southern Railway, promulgating said increase, was dated March 21, 1903.

Trans., Part I, p. 9.

* * * * * * * *

The fact that the increases severally promulgated by appellants were to take effect on the same date is immaterial, because there is nothing in the law to prohibit one railroad company from making its tariff take effect upon the same date that the tariffs of its competitors are to take effect.

It is to the interest of the public, as well of competing carriers, that the tariffs of all competing lines shall take effect on the same date. The sixth section of the Act to Regulate Commerce requires that every common carrier, subject to its provisions, shall file with the Commission copies of its schedule of rates, and shall promptly notify the Commission of all changes made in the same.

21 U. S. Stat. at Large, pp. 379, 380.

One of the objects of said section was to enable every common carrier to ascertain promptly the schedule of rates of its competitors, so as to enable every common carrier to make its own increases or reductions in rates take effect as nearly as possible at the same date as those of its competitors, but as the sixth section failed to require each common carrier to furnish its competitors with copies of its schedules of rates, *at the time of issue*, the second section of Article VI of the Southeastern Freight Association, in aid of the sixth section of the Act to Regulate Commerce, required that its members shall *at the time of issue* file with the chairman copies of all tariffs or rates that may be issued

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by such member, and in which any other member may be interested.

Trans., Part I, p. 72.

This requirement of said association enables its members to ascertain the tariffs of their competitors several days in advance of the time that they could ascertain said tariffs by applying to the Interstate Commerce Commission.

* * * * * * * *

As to the finding that appellants promulgated the increase to take effect "for exactly the same amount," it was useless for either of appellants to promulgate its increase for more than the increase promulgated by its competitors, and as each of appellants was satisfied from the discussions and interchanges of views that each of them would make the increase for the same amount, it was accordingly done.

## XLIX.

### There has been No Suppression of Competition in This Case.

The majority report and opinion (Trans., Part II, p. 1046) said:

"Competition is favored by the laws. . . . The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates."

In support of that proposition, the majority of the Commission refer to the decisions of this Court in the Trans-Missouri and Joint Traffic Association cases.

The facts in those cases fell clearly within said proposition, the soundness of which is fully conceded.

But "the Trans-Missouri and Joint Traffic Association cases" afford no precedent for the application of said proposition to the facts of this case.

"Each of those associations was formed by a contract under which the companies selected a central authority to fix and maintain rates. There was an absolute suppression of competition. The power of independent action was destroyed. No company could change a rate fixed by the managers of the association, without subjecting itself to a penalty."

Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep. I. C. C., p. 19.

In this case the members of the Southeastern Freight Association have not selected a central authority, or any other authority, to fix and maintain rates. On the contrary, each member expressly reserves the right to make and change its own rates. There cannot be "a suppression of competition," nor a destruction of "the power of independent action," under articles of association which expressly reserve to each member the right to change its rates at any moment. There has never been an instant of time since the increase complained of in this case was promulgated, when any member of the Southeastern Freight Association could not revoke said increase and reduce its rates to any figure, even though such figure be below that at which the rates were, when said increase was made.

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L.

THE INCREASE OF TWO CENTS PER HUNDRED POUNDS COMPLAINED OF IN THIS CASE IS THE OUTCOME OF COMPETITION.

The majority report and opinion (Trans., Part II, p. 1047) said:

"The advanced rates complained of cannot be claimed to be the outcome of competition, because 'the natural, direct and immediate effect of competition is to lower' (171 U. S. 577, 43 L. Ed., 290, 19 Sup. Ct. Rep., 25), rather than advance rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce."

Appellants certainly do claim that the increased rates complained of are the outcome of unrestrained competition; and they do so because said rates are the outcome of the action of carriers who can, and do compete, free from any restraint whatever. The circumstances and conditions existing when said increase of 2 cents per 100 pounds was made, would have fully justified a much greater increase, and it was nothing but this competition which existed between the appellants that prevented an increase of much more than 2 cents.

Appellants have hereinbefore shown that the articles of association of the Southeastern Freight Association do *not* "suppress competition" nor "destroy the power of individual action."

Competition always exists, and exists in every case, so long as each and every competitor reserves to itself the right to make or change its own rates.

See opinion Hon. John W. Griggs, Attorney General, 13 Ann. Rep. I. C. C., pp. 18, 19.

## LI.

### Neither the Commission nor the Courts Below had any Jurisdiction, in this Case, of the Anti-Trust Act.

The majority report and opinion (Trans., Part II, pp. 1045, 1046) said:

"It is insisted in behalf of the defendant that while there may be this concert of action, it does not amount to an unlawful agreement under the so-called 'Anti-Trust Act.'"

"As we have said in our opinion in the case of the Central Yellow Pine Association v. Illinois Central Railroad Company et al. (ante 561) 'we deem it unnecessary to express an opinion on this point, the enforcement of that act being properly cognizable by the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action and previous understanding between the carriers, it is manifest whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly

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inconsistent with competition, and during the time the rates fixed by concert of action are maintained the effect so far as competition is concerned is the same as if there was a binding agreement to maintain such rates.' "

We have hereinbefore shown that there was no concert of action in the sense of an agreement or understanding, and that if there had been concert of action, even in the sense of an agreement, it would not have violated the Anti-Trust Act; because there was no suppression of competition nor destruction of the power of independent action.

See Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

* * * * * * * *

As to the proposition asserted in the extract quoted above, that concert of action is wholly inconsistent with competition, we have hereinbefore shown that though it be true that concert of action which amounts to an absolute suppression of competition, and the destruction of independent action, as was the fact in the Trans-Missouri and Joint Traffic Association cases, is prohibited, yet where the association has no power to make and maintain, and each individual member reserves the right to make and change its own rates, free from the dictation of any one, such concert of action does not "suppress competition," nor "destroy independent action," and therefore is not prohibited by the Anti-Trust Act.

Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep. I. C. C., p. 19.

* * * * * * * *

As to the proposition asserted in the extract quoted at

the head of this section, that "during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates;" the majority of the Commission doubtless relies upon, though it does not cite, the following language from the opinion of this Court in the case of U. S. v. Trans-Missouri Freight Association, 166 U. S., 341, viz.: "And although the parties have a right to withdraw from the agreement *on giving thirty days' notice of a desire so to do, yet while in force (i. e., the contract of association) and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.*"

The difference between the Trans-Missouri case and this case is that in the former the companies selected a central authority to fix and maintain rates, which was an absolute suppression of competition and a destruction of the power of independent action. So long as a company remained a member of the Trans-Missouri Association, whether it did so for an hour, a day, a week or a month, its rates were absolutely controlled by the central rate-making authority of the association, and it could not change any rate fixed by that authority without subjecting itself to a penalty; but in the case of the Southeastern Freight Association, no rate is fixed by the association, or by any central authority within the association, because each and every rate is made separately and independently by the individual members; and instead of agreeing that rates made by the association, or any central authority in the association, shall be maintained by a member until it gives thirty days' notice of a desire to withdraw from the association, the articles of the South-

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eastern Freight Association expressly provide that each and every member may change its rates at any time without withdrawing from the association, and without hindrance from any one, either in or out of the association. There never has been an hour or even a minute during which any member of the Southeastern Freight Association has been bound to maintain any rate made by it for any length of time, however brief.

* * * * * * * *

As to the proposition involved in the extract quoted above, that though the enforcement of the Anti-Trust Act is not properly cognizable by the Commission, it is within the scope of the authority and duty of the Commission to consider the action of the appellants as members of the Southeastern Freight Association in the aspect of its bearing upon the reasonableness and validity of the increased rate, we insist that if the Commission has no jurisdiction to enforce the Anti-Trust Act, it has no right to consider whether the action of the appellants as members of said association is or is not in violation of that act; and while the majority of the Commission "deem it unnecessary to express an opinion" as to whether the appellants have violated said act, the enforcement of which is admitted to be "properly cognizable by the courts," the report and opinion of the majority is predicated almost entirely upon the theory that the appellants have violated said act in increasing the rates in controversy in this case.

In the case of Sprigg v. B. & O. R. Co., 8 I. C. Rep., pp. 456, 457, the Commission took what we contend is the sound view of this question. In that case the Commission said:

*"The real difficulty is that the Commission has no authority to administer the Anti-Trust Law, or even to determine whether that law has been violated.* A court of general jurisdiction could do so, but not an administrative body whose power is limited by the law which created it. We are not prepared to admit that the evidence in this case shows a violation of the s atute against trusts, but even if the fact of such violation were clearly established, *we do not see how that of itself furnishes ground for an order by us against the rates now in force.* Whatever may have been the nature of the agreement or understanding, if there was any, which preceded or resulted in the withdrawal of the quarterly ticket by bot h roads at about the same time, there is no proof whatever that the rates now charged *are maintained* by virtue of unlawful compact. If each carrier had advanced its rates by purely independent action and in a perfectly legal manner, and *such advanced rates were reasonable in fact under all the circumstances, no doubt could arise as to the lawfulness of the transaction.* Would those same rates be rendered unreasonable by showing that lower rates were withdrawn by a concert of action prohibited by the Anti-Trust Law? *We do not think so.* If an investigation by the Commission discloses a violation of that law, its power is not enlarged or its duty changed in respect of the rate involved in the inquiry. *The most it could do in such case would be to lay the proofs before the Attorney General for such action as he might think proper to take."*

In the case of Cattle Raisers' Assn. v. Ft. W. & D. C. Ry. Co. et al., 7 I. C. Rep., 535, the Commission held in substance the same that it held in the Sprigg case above cited.

If the Commission had no jurisdiction to declare said

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increase of 2 cents per 100 pounds to be unreasonable because it violates the Anti-Trust Act, the majority of the Commission, in their report and opinion, should not have referred in any way to that act.

But the frequent references in the majority report and opinion to said act, and to the Trans-Missouri and Joint Traffic Association cases, make it manifest that if the majority of the Commission had not believed that the action of the appellants as members of the Southeastern Freight Association is violative of said act, the report and opinion would not have found that said increase is unreasonable or unjust.

To paraphrase the language of this Court in the case of I. C. C. v. L. & N. R. R. Co., 190 U. S., pp. 284, 285, no room in reason is left to sustain the view that the majority of the Commission could have held that said increase of 2 cents per hundred pounds was in and of itself unreasonable, if appellants had not been members of said association.

## LII.

### The Error of Judge Speer in Holding that the "Purpose" of the Southeastern Freight Association is to Fix and Control Rates.

The errors of the majority of the Commission upon which we have hereinbefore commented were, in effect, approved and adopted by His Honor Judge Speer, who thereby made said errors his own. And, to save repetition, we ask that our comments be applied to them as errors of His Honor, as well as errors of the majority of the Commission.

There are, however, certain expressions in His Honor's opinion which we desire to notice.

He said that the purpose of the Southeastern Freight Association is "plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight."

138 Fed. Rep., p. 754, Tift v. Southern Ry.

The "purpose" of said association must, of necessity, be ascertained either from its articles of association or from the action of its members.

Said articles certainly disclose no such "purpose" as is attributed by His Honor. On the contrary, they expressly provide that neither a majority, nor any number of members of the association, nor any board, committee or officer of the association shall have any power or authority to make or fix rates or tariffs upon the line of any member of the association.

Trans., Part I, p. 72.

And so, if we look to the action of its members to ascertain the "purpose" of the association, we will see that the traffic representative of each member involved in this suit testified under oath that said association does not make, fix or control the rates of any of the members.

Powell, Trans., Part II, pp. 910, 911, 912, 913.
Green, Trans., Part II, p. 531.
Compton, Trans., Part II, pp. 639, 691.
Winburn, Trans., Part II, pp. 802, 803.
Capps, Trans., Part II, pp. 860, 861.
Cutler, Trans., Part II, pp. 885, 886, 887.
Menzies, Trans., Part II, pp. 892, 895, 896.
Culp, Trans., Part II, pp. 460, 461.

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We deny that His Honor has any right to ascribe to said association an illegal "purpose" merely because he evolved it "out of his inner consciousness," when it has been distinctly disproved, as well by the articles of the association as by the sworn testimony of the traffic representatives of its members.

## LIII.

### The Southeastern Freight Association has no Authority to Issue a "Firman" or "Ukase."

His Honor Judge Speer said: "The territory to which this association extends *its dominating control* comprehends the States of Virginia, North Carolina, South Carolina, Georgia, Florida and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the Sultan or the ukase of the Czar."

138 Fed. Rep., pp. 754, 755, Tift v. Southern Ry.

A French officer, while witnessing the celebrated "charge of the six hundred," exclaimed: "It is magnificent, but it is not war!" and so we say of the sophomorical language employed by His Honor, "It is magnificent, but it is not true."

As shown by the articles of association, and proven by the traffic representatives of its members, said association

has not one iota of control over the rates charged for transportation in the imperial territory described by His Honor, or in any other territory. And so far from said association having the power to issue orders "more authoritative than the firman of the Sultan or the ukase of the Czar," it has no power to issue any orders at all.

## LIV.

### Appellants have Not Violated the Pooling Section of the Interstate Commerce Law.

His Honor Judge Speer said:

"This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the Interstate Commerce Law which forbids *pooling*."

138 Fed. Rep., p. 761, Tift v. Southern Ry.

The fifth section of the Act to Regulate Commerce prohibits "the pooling of freights of different and competing railroads," or the division between them of "the aggregate or net proceeds of the earnings of such railroad, or any portion thereof."

24 U. S. Stat. at Large, p. 379, et seq.

There is not a scintilla of testimony that any two or more of appellants have ever pooled a pound of their freight, or divided a dollar of their gross or net earnings.

Each of appellants makes its own rates, carries its own freight and collects and retains its own earnings.

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Inasmuch as the articles of said association contain no reference whatever either to a physical pooling of freights, or to a division of earnings by means of a money pool, and inasmuch as the conferences between the railway officers preceding the increase complained of had absolutely nothing to do with a division of traffic, or of earnings from traffic between competing railways, it is impossible to discover the process of reasoning upon which the erroneous assertion above quoted was arrived at by His Honor.

## LV.

### We have Never Insisted that Because the Members of Said Association Could Withdraw from the Association Agreement at Any Time it Was Not a Combination in Restraint of Trade.

His Honor, Judge Speer, further said:

"It was insisted by the learned special counsel for respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. That is merely a recitation of a privilege which any party to an unlawful enterprise enjoys."

138 Fed Rep., p. 763, Tift v. Southern Ry.

The counsel referred to by His Honor never insisted that because each and all the members could at will and at any time withdraw from the association agreement, it was

not a combination in restraint of trade. What said counsel did contend for was that the association agreement was not an "agreement to fix rates" at all.

His contention was that there was not, and could not be, any "agreement to fix rates;" because the articles of association expressly provide that no majority, nor any number of members, nor any committee, nor any officer of said association, shall have the power to make rates upon the line of any other member, and expressly reserve to each member the right to make its own rates, and to change them at will.

In the Trans-Missouri Association case there did exist an illegal "agreement to fix and maintain rates," and no member could change the association rates without withdrawing from the association agreement. See 166 U. S., p. 341.

But in this case we contend that there is absolutely no agreement to either "fix" or "maintain" rates; that there are no such rates as "association rates;" that each member expressly reserves the right to make its own rates; and that it may change those rates at any time, without withdrawing from said association.

It is not the case of a party to an unlawful association agreement being compelled to withdraw from the association before it can change the "association rates;" but it is the case of a party who, under the terms of a lawful association agreement, has the right to make its own rates and to change them at any time, without withdrawing from the association at all.

We do not object to His Honor inventing a faulty argument, and then answering it to his own satisfaction; but we do object to his ascribing to us a faulty argument which we did not make, while he fails to answer the argument which we did make.

## LVI.

### Appellants have Never Claimed the Right to Arbitrarily Increase Freight Rates.

His Honor, Judge Speer, further said:

"The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by *arbitrarily* increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations."

138 Fed. Rep., p. 763, Tift v. Southern Ry.

The appellants have never entertained any such belief as His Honor has invented and ascribed to them. They know that the rates in controversy in this case have not been made "*arbitrarily;*" and their "belief" is that said rates have been fairly and equitably adjusted upon full consideration of the cost of service to the carrier, the value of the service to the shipper, the effect of competition between carrier and carrier, the effect of competition between market and market, the effect of competition between product and product, and every other circumstance and condition which should be considered in attempting to arrive at a just and reasonable rate.

## LVII.

### Railroads May Lawfully Graduate Their Charges in Proportion to the Prosperity of the Industries Whose Products They Transport.

His Honor said:

"They (the railroads) have no right to graduate their charges in proportion to the prosperity which accrues to industries whose products they transport."

138 Fed. Rep., p. 767, Tift v. Southern Ry.

The position taken by His Honor is directly opposed to that taken by the Commission, In Re Proposed Advances in Freight Rates (9 I. C. Rep., pp. 386, 439), where the Commission said: "Where reductions have been made by reason of commercial depression, it is difficult to see why corresponding advances may not with propriety occur when that depression is relieved."

His Honor concedes that after said increase of 2 cents per 100 pounds was made, and after this controversy was passed upon by the Commission, there had been, for well-known causes of a political nature, a great and enthusiastic revival in the business, enterprise and confidence of the country. A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the increased rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants, and received as evi-

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dence, in the Circuit Court, after this controversy got back to that Court from the Commission.

138 Fed. Rep., p. 766, Tift v. Southern Ry.

The majority report and opinion (Trans., Part II, p. 1027) said:

"After the advance in rates from Georgia points, June 22, 1903, there was a material falling off in the shipments of lumber to the West, or points on and north of the Ohio River."

The fact that there had been such a falling off in shipments was made one of the main grounds relied upon by the majority, for holding that said so-called advance was unreasonable.

Appellants insisted before the Commission that said falling off in shipments was only temporary; that it was due to a temporary stoppage of the manufacture of railroad cars and equipment (which had consumed from 60 to 80 per cent of the Georgia lumber shipped to the West); and that as soon as the Presidential election should be over and business conditions become settled, the manufacture of railroad cars and equipment would be resumed and the demand for lumber restored.

The supplemental affidavits referred to by His Honor showed "plainly enough" that appellants were right in their prediction; and thereby one of the main objections waged against said increase by the majority of the Commission was entirely removed.

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## LVIII.

### In Considering the Reasonableness of the Increase the Enormous Expenditures which Appellants have been Forced to Make in Recent Years Should be Given Due Weight.

The majority report and opinion (Trans., p. 1039) said:

"There was a long period of business depression in the South during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper or first class condition. When that period passed away, unusual expenditures were required for new engines, new car equipment, the replacing of worn-out rails and in other ways necessary to put the roads in proper condition and enable them to handle their largely increased business."

And upon the same subject His Honor, Judge Speer, said:

"Where formerly asthmatic engines, attached to unsafe and noisome trains, through the solitudes of an impoverished country, like a wounded snake, dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration kindles and the pulse leaps as the limited express

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laden with its human freight glances by on its mission of progress and civilization."

138 Fed Rep., p. 767, Tift v. Southern Ry.

When it is remembered that the millions of dollars required to make said improvements and repairs have been charged to operating expenses which were deducted from gross earnings, and thereby reduced the net earnings which otherwise would have gone to the railroad stockholders, it will be seen that said improvements and repairs, which have contributed so much to the prosperity of the country, were made at the sole expense of those stockholders, who have no possible means of reimbursing themselves except by such slight increase in their rates as will, to some extent, restore the normal percentage which net earnings should always bear to gross earnings, and yet not interfere with the free and profitable movement of the traffic of the country.

That the lumber traffic is now moving freely and profitably under the so-called advance complained of in this case, "is plainly enough shown by the numerous supplemental affidavits" filed in the Circuit Court after this controversy returned to that court from the Commission.

138 Fed. Rep., p. 766, Tift v. Southern Ry.

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## LIX.

THE "FINDINGS OF FACT" MADE BY THE COMMISSION IN THE CASE AT BAR ARE NOT CONCLUSIVE ON THIS COURT.

"Findings of fact" are not even *prima facie* evidence, unless the inquiry made by the Commission be conducted "on a proper basis."

162 U. S., p. 235, T. & P. Ry. v. I. C. C.

"Findings of fact" must be made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded."

162 U. S., p. 238, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.

"Findings of fact" must be made "in the light of all facts duly alleged and supported by competent evidence."

162 U. S., p. 228, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.

If the Commission exclude facts and circumstances that ought to have been considered, or if it "unduly restricts its inquiries," the "findings of fact" are not *prima facie* evidence.

162 U. S., pp. 235, 239, T. & P. Ry. v. I. C. C.

The inquiry made by the Commission in the case at bar was not conducted "on a proper basis;" it was not made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded;" and it was "unduly restricted in its scope;" as herein before shown in this argument.

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The fact that the Court is authorized to "hear and determine the matter as a court of equity" necessarily implies that the Court is not concluded by the findings or conclusions of the Commission.

162 U. S., p. 239, T. & P. Ry. v. I. C. C.
168 U. S., p. 175, I. C. C. v. Ala. Midland Ry.
50 Fed Rep., 304, I. C. C. v. A. T. S. F. R. Co.
49 Fed. Rep., 180, I. C. C. v. L. V. R. Co.
37 Fed. Rep., pp. 613, 614, K. & I. Bridge Co. v. L. & N. R. R.

There is power in the Circuit Court, and the Circuit Court of Appeals "to consider and apply the evidence," and in this Court to review their decisions.

168 U. S., p. 174, I. C. C. v. Ala. Midland Ry.

## LX.

### The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as Much Weight as the General Verdict of a Jury.

It has been said by this Court that the question whether a rate is reasonable, is a question of "fact."

162 U. S., 196, C. N. O. & T. P. Ry. v. I. C. C.
162 U. S., 219, 227, 235, 238, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.
181 U. S., 28, E. T. V. & G. Ry. v. I. C. C.

It is manifest, however, that the Court did not intend to say that the question whether a rate is reasonable is one of "*pure* fact;" and that all the Court intended to say was that it is a question of "fact mixed with law."

Some questions involve "*pure* matters of fact, *unmixed* with any element of law;" while other questions involve matters of fact in which are mixed elements of law; and the latter are known as "questions of mixed law and fact."

Bliss' Code Pldg, 208.

Thus, the question of fraud is one necessarily compounded of fact and of law.

123 U. S., 432, 433, Jewell v. Knight.

And so the questions of "negligence" and "reasonableness" are mixed questions of law and fact.

88 Fed. Rep., p. 448, Dooley v. Pease.

It has been said by this Court that "the general verdict of a jury *concludes* mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the courts upon a question of law."

112 U. S., p. 674, Martinton v. Fairbanks.

9 Wall., p. 127, Norris v. Jackson.

But a finding of facts made by the Commission does not "conclude" either pure questions of fact, or mixed questions of law and fact; because the Act to Regulate Commerce expressly enacts that a finding of facts made by the Commission shall be only *prima facie* evidence.

37 Fed. Rep., 613, K. & I. Bridge Co. v. L. & N. R. R.

62 Fed. Rep., 693, Shinkle, Wilson & Kreis Co. v. L. & N. R. R.

In other words, while the general verdict of a jury "*con-*

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*cludes*" a mixed question of law and fact, a finding made by the Commission is only *prima facie* evidence of such matters of "pure fact" as may be involved in the question.

There is a substantial reason why Congress did not permit a finding by the Commission to have the conclusive effect of a general verdict by a jury on a mixed question of law and fact.

Every mixed question of law and fact necessarily involves matter of law; and every litigant has the right to have all matters of law decided *by the Court*.

In the case of a general verdict by a jury either party may readily obtain the judgment of the Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four modes:

First: Either party may request the Court to give the jury proper instructions as to the rules and principles of law by which they are to be governed in their determination of the question.

Second: Or either party may request the Court to inform the jury hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegation in the pleading.

Third: Or either party may request the Court to instruct the jury to find the facts specially; and then the Court will apply the law, and pronounce whether or not the facts

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so found are sufficient to support the averments of the parties.

Fourth: Or either party may present to the Court their propositions of law, and require the Court to rule on them.

1 Head (Tenn.), 616, 617, Whirley v. Whiteman.
9 Wall., 128, 129, Norris v. Jackson.
52 Mo., 207, 209, Fourth National Bank v. Heuschen.
19 Am. and Eng. Enc. of Law, p. 633.

But in proceedings before the Interstate Commission it is impossible for a party to ever obtain the judgment of any court upon the matter of law involved in a mixed question of law and fact, if the finding made by the Commission on that question be given as conclusive effect as is given to the general verdict of a jury.

## LXI.

### The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as Much Weight as the General Finding of a Court.

Under the fourth section of the act of March 3, 1865, when the parties waive a jury, a general finding of the Court upon the facts has the same effect as the general verdict of a jury; and where the general finding of a Court includes a mixed question of law and fact, it is as conclusive as the general verdict of a jury, except so far as the matter of law involved in the question may be saved by some excep-

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tion which the party has taken to the ruling of the Court on the law.

9 Wall., 127, 128, Norris v. Jackson.
12 Wall., 297 Miller v. Life Ins. Co.

But, where the finding of a trial court is general, either party may readily obtain the judgment of the Appellate Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four ways:

First: Either party may object to the admission or exclusion of evidence and require the trial Court to rule on the objection.

Second: Or either party may present to the trial Court his propositions of law and require the Court to rule on them.

Third: Or either party may ask for definite ruling by the Court as to whether all the evidence is sufficient in law to warrant a finding in his favor.

Fourth: Or either party may get the trial Court to make a special finding, which raises the legal propositions.

9 Wall., 128, 129, Norris v. Jackson.
12 Wall., 297, Miller v. Life Ins. Co.
112 U. S., 672, 673, Martinton v. Fairbanks.

When the verdict of a jury is special, or the finding of facts by a court is special, such a verdict, or finding, "raises the legal propositions" involved in a mixed question of law

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and fact, and the power of review by this Court extends "to the determination of the sufficiency of the facts found to support the judgment."

9 Wall., 122, 129, Norris v. Jackson.
12 Wall., 297 Miller v. Life Ins. Co.
112 U. S., 672, 673, Martinton v. Fairbanks.

It will be seen, therefore, that whether the verdict of a jury or the finding of a court be general or special, either party can compel the separation of matter of law from matter of fact involved in a mixed question of law and fact, and demand the judgment of the court upon so much of the question as consists of matter of law. But, according to the contention of appellee, the finding of the Commission on the mixed question of law and fact as to the reasonableness of a rate is conclusive on the matter of law involved in the question, and neither this nor any other Court can review the judgment of the Commission on such matter of law.

To paraphrase the language of this Court in C. M., etc., Ry. v. Tompkins, 176 U. S., p. 172, when we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting principle which insures to every one else the judgment of the *courts* upon all questions of *law*, is one which cannot be tolerated.

Respectfully submitted,

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